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Supreme Court of the United States

OCTOBER TERM, 1948

No. 42

AUGUST KLAPPROTT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 10, 1948.
CERTIORARI GRANTED MAY 17, 1948.

Supreme Court of the United States

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[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

APPENDIX TO BRIEF FOR APPELLANT

[fol. 1] IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCKET ENTRIES

May 12, 1942. Complaint, filed.

May 13, 1942. Summons issued

May 18, 1942. Summons returned served personally May 15, filed.

July 17, 1942. Case called, Court ordered Default for failure to answer, and also for entry of judgment cancelling certificate of naturalization. (Smith).

July 21, 1942. Judgment cancelling Naturalization certificate, filed.

Nov. 2, 1942. Order amending judgment insofar as date of admission is concerned, filed.

Jan. 8, 1947. Petition and order to show cause why judgment cancelling Naturalization Certificate should not be reopened, filed 1/7/47 (Smith) Notice mailed.

Jan. 28, 1947. Hearing on petition to vacate judgment. Ordered decision reserved. Briefs to be submitted.

Feb. 7, 1947. Opinion, filed (Smith) (Petition to vacate judgment, dismissed.) Order to be submitted.

Feb. 18, 1947. Order denying petition to vacate judgment, filed 2-17-47 (Smith) Notice mailed.

Mar. 19, 1947. Notice of Appeal, filed Mar. 17.

Mar. 19, 1947. Copies forwarded to Edgar H. Rossbach, Esq., and to the Clerk, U. S. C. C. A.

Mar. 19, 1947. Designation of Record on Appeal, and acknowledgment of service, filed Mar. 17, 1947.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT

The United States of America, by Charles M. Phillips, United States Attorney for the District of New Jersey, pursuant to Section 338, Nationality Act of 1940 (Title 8 USCA, Sec. 738) says:

1. The defendant, August Klapprott, was a citizen and national of the German Reich on and prior to November 16, 1933.

2. The defendant duly filed in the office of the Clerk of the Common Pleas Court, Hackensack, on July 27, 1933, a petition (No. 18339) praying that he be admitted to citizenship in the United States of America. In his petition the defendant averred among other things that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; that it was his intention in good faith to become a citizen and to reside permanently in the United States and that it was his intention to renounce absolutely and entirely all allegiance and fidelity to any foreign state or sovereignty to which he was at the time of his petition a subject or a citizen.

3. In due course, the Court had a hearing on the petition of the defendant and on November 16, 1933, entered a judgment thereon admitting the defendant to citizenship.

4. Accordingly, as provided by statute on November 16, 1933, the defendant was administered and took the oath required for naturalization thereupon solemnly declaring before God and in open court that he absolutely and entirely renounced and adjured all allegiance and fidelity to the state or sovereignty of the German Reich; that he would support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same, and that he took the obligation freely and without any mental reservation or purpose of evasion.

[fol. 3] 5. The oath made by the defendant to the petition and of renunciation of allegiance to the German Reich was false and, thereby, he fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization (No. 370-7549), which was received

by the defendant on November 16, 1933, should be revoked and cancelled for the following reasons:

At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, the defendant well knew and realized he was not attached to the principles of the Constitution of the United States and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or citizen and, further, that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic, and further that he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion.

6. In particular, and among other things, the plaintiff charges that contrary to the oaths prescribed by law for admission to citizenship, and received and taken by the defendant:

The defendant is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund and its affiliates in and about the district of New Jersey. He has been president of the German-American Bund and director of Camp Nordland; Vice-President of the A. V. Publishing Company; member of the Board of the A. V. Development Corporation; head of the Protective Citizens' League, Inc.; trustee for the Eastern Department of National Protective Trustees.

[fol. 4] From time to time and subsequently to 1935, the defendant has made, both in writing and in speeches, numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America.

The principles of the organizations referred to above are inimical to the Constitution of the United States and to the good order and happiness of the United States, and in fact were propagated and encouraged by the present enemies of the United States including persons who believe in the ideology enunciated by

Adolph Hitler and the present ruling party of the German Reich.

7. The defendant resides at Camp Nordland in the Municipality of Andover, County of Sussex and District of New Jersey and within the jurisdiction of this Court.

The plaintiff asks for judgment revoking and setting aside the order admitting the defendant to citizenship in the United States of America, and cancelling the certificate of naturalization delivered to the defendant and directing the defendant to surrender the certificate to the Commissioner of Immigration and Naturalization, and that the defendant be forever restrained and enjoined from using and claiming any rights, privileges and benefits obtained by reason of his naturalization, and that the Clerk of this Court be directed to transmit a certified copy of the judgment entered herein, together with the certified copy of the judgment of naturalization to the Commissioner of Immigration and Naturalization, if surrendered, and further, that the Clerk of this Court transmit a certified copy [fol. 5] of the judgment to the Clerk of the Common Pleas Court, Hackensack, and that the plaintiff have such other and further relief as may be judged proper.

Charles M. Phillips, United States Attorney, Richard J. Hughes, Asst. United States Attorney.

Trenton, New Jersey, May 12, 1942.

County of Essex,
District of New Jersey, ss:

W. Rulon Paxman, being duly sworn on his oath, deposes and says:

1. I am a Special Agent of the Federal Bureau of Investigation, U. S. Department of Justice, and I am assigned to duty in the Newark Field Division at Newark in the District of New Jersey and in the course of my official duty I have examined the files of the Federal Bureau of Investigation and in cooperation with the Immigration and Naturalization Service of the Department of Justice, I have received from the official files the facts concerning the Naturalization proceedings of the subject, August Klapprott.

2. I have heretofore presented a statement of the facts in this matter to Thorn Lord, Assistant United States Attorney for the District of New Jersey.

3. I have this day read the annexed copy of the form of complaint entitled United States of America v. August Klapprott, dated May 12, 1942 to which this is attached and the facts stated therein are true to the best of my knowledge and belief and the sources of the said facts are the official records of the files of the Federal Bureau of Investigation and the Immigration and Naturalization Service of the Department of Justice.

[fol. 6] 4. I have been officially advised by the said Thorn Lord, Assistant United States Attorney that in the opinion of the United States Attorney the facts presented to him by me and set out in the annexed form of complaint state a good cause for action under the provisions of Section 738 of Title 8, U. S. C. A. for the revocation of the Naturalization of August Klapprott.

W. Rulon Paxman, Special Agent, Federal Bureau of Investigation.

Sworn and subscribed to before me at Newark, New Jersey, this 12th day of May, 1942.

Stanley Ruttcowski, Notary Public of New Jersey.

[fol. 7] IN UNITED STATES DISTRICT COURT

JUDGMENT

It appearing to the Court that on July 17, 1942, the Clerk of the United States District Court, at the request of the United States Attorney, duly entered the default of the defendant for failure to answer within the time limited therefor;

On the motion of Charles M. Phillips, United States Attorney for the District of New Jersey, (Thorn Lord, Asst. United States Attorney):

It is, on this 17th day of July, 1942, adjudged and ordered that the decree and order of the Common Pleas Court, Hackensack, New Jersey, made and entered on the 27th day of July, 1933, admitting the defendant to be and become a citizen of the United States, be and the same is hereby set aside and held of no effect;

And it is further adjudged and ordered that the Certificate of Naturalization issued to the defendant by the Common Pleas Court, Hackensack, New Jersey, be and the same is hereby cancelled, and the defendant be and he hereby is forever enjoined and restrained from setting up and claiming any rights, privileges or advantages under the said decree and order and under the said Certificate;

And it is further adjudged and ordered that the Clerk of this Court transmit a certified copy of this judgment as well as the aforesaid Certificate of Naturalization, if surrendered, to the District Director, Bureau of Naturalization, U. S. Department of Justice;

And it is further adjudged and ordered that the Clerk of this Court transmit a certified copy of this judgment to the Clerk of the Court of Common Pleas, Hackensack, New Jersey.

William J. Smith, United States District Judge.

[fol. 8] IN UNITED STATES DISTRICT COURT

ORDER AMENDING JUDGMENT

It appearing to the Court that due to a clerical inadvertence the correct calendar date of the admission of the defendant August Klapprott to citizenship in the United States of America by way of naturalization is erroneous and it further appearing that the correct and proper date of admission is a matter of public record appearing in the official records of the Clerk of the Court of Common Pleas, Hackensack, New Jersey, and that the aforesaid date is November 16, 1933.

It is on this 2nd day of November, 1942, ordered and adjudged that the Judgment revoking the naturalization of the defendant August Klapprott be hereby amended so that the date of the admission of the defendant to citizenship in the United States of America set out in the 9th line of page 1 of the Order shall be November 16, 1933 and that in all other respects the said Judgment dated July 17, 1942 shall remain in full force and effect.

William J. Smith, United States District Judge.

[fol. 9] IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER TO SHOW CAUSE

To the Honorable, the Judges of the United States District Court for the District of New Jersey:—

The petition of August Klapprott, the above named defendant, respectfully shows that:—

1. Petitioner was served with a summons and complaint in the above matter, in which the United States of America was seeking to obtain a judgment revoking and cancelling the certificate of naturalization No. 370-7549 which was received by petitioner on November 16th, 1933.

2. At the time that petitioner received the summons and complaint, his circumstances were such that it was not possible for petitioner to enter a proper defense, as a result of which a judgment was entered against petitioner on the 21st day of July, 1942, cancelling his aforesaid naturalization certificate.

3. The facts surrounding petitioner's failure to enter a defense to the aforementioned action were as follows:— a short time prior to the date of the service of the said summons and complaint upon petitioner, he had been confined in Christ Hospital in Jersey City, New Jersey, having been very seriously ill, suffering from stomach ulcers, the seriousness of which illness was such that petitioner was at times in danger of losing his life, and during which time petitioner required two blood transfusions. Upon his release from the hospital, petitioner was in very poor health, as a result of which he was advised to live in a place where he could receive proper rest and relaxation. Since petitioner was in very poor financial circumstances and in view of his affiliations with the German-American Bund, which was at that time the owner of a recreation camp at Andover, New Jersey, known as Camp Nor-land, petitioner made arrangements to live at Camp Nordland until such time as his health improved.

[fol. 10] 4. While living at Camp Nordland and on the 15th day of May, 1942, petitioner was served with the summons and complaint in the abovementioned proceeding. In view of his poor physical condition, petitioner was unable to get around very well and since he was also in very poor

financial condition, petitioner had no money with which to retain a lawyer to represent him. In order to obtain some legal assistance, petitioner wrote out and addressed a letter to the American Civil Liberties Union of New York, in which he explained that he had no money with which to retain a lawyer and requested that they arrange for some legal assistance for him. This letter was in petitioner's possession on the day of his arrest and was taken away from him by the Federal Bureau of Investigation, and so far as petitioner knows, it was never mailed and is undoubtedly in the hands of the United States Department of Justice. Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away.

5. Before the time expired for filing an appearance and on or about July 7th, 1942, petitioner was taken into custody by the Federal authorities on an indictment which was found against petitioner in the United States District Court for the Southern District of New York, along with many other persons, all of them being charged with a conspiracy to violate the Selective Service Act. Since petitioner had no funds with which to retain an attorney, the court appointed an attorney, by the name of McDonald, to defend him and at that time petitioner brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but petitioner later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against petitioner by default, after having, by his prom-
[fol. 11] ises, lulled petitioner into a sense of security with respect to this matter.

6. The indictment on the charge of conspiracy to violate the Selective Service Act was tried in New York City and at all times during a very lengthy trial, petitioner was kept in custody under an exceedingly high bail, and since petitioner was unable to furnish such bail and was unable to get around, he was still unable to take any steps in connection with the denaturalization proceedings. Petitioner was found guilty of the said conspiracy charge and although an appeal was filed, petitioner continued to remain in cus-

tody until June, 1943, at which time petitioner decided to begin the service of his sentence and was transferred to the Federal Correction Institution at Milan, Michigan. Petitioner remained at the said Federal Correction Institution at Milan, Michigan, until January 30th, 1944, when he was transferred to the District of Columbia, having been indicted with twenty-nine other persons in the case of United States vs. Joseph McWilliams, et als., also referred to as "The Sedition Case."

7. The aforesaid sedition case took about eight months of trial and as a result of the untimely death of the Judge, a mistrial was declared sometime about the first part of December, 1944. Petitioner was kept in custody continuously thereafter and until November 21st, 1946, when he was released by reason of the fact that the Chief Justice of the District Court of the United States for the District of Columbia ordered the indictment dismissed, and since there were no further convictions or indictments pending against petitioner, he was released, but petitioner was then immediately remanded to custody for the purpose of deportation, and petitioner is at present confined at Ellis Island, New York, awaiting the pleasure of the United States Government with respect to his possible deportation.

[fol. 12] 8. During the month of July, 1945, petitioner and a number of other persons instituted an action in the District Court of the United States for the District of Columbia, in an effort to obtain an injunction against the Department of Justice to prevent deportation, but that relief was denied by the District Court and the United States Court of Appeals in the District of Columbia, and the United States Supreme Court also denied certiorari on December 9th, 1946.

9. Petitioner's reasons for failing to file an answer or enter an appearance in the aforesaid denaturalization proceedings are set forth above, but petitioner wishes to reiterate that it was never his intention to permit this matter to go by default. Since he was seriously ill, physically, and since he was in custody during all of the time above-mentioned, and since he had no financial means of obtaining proper legal representation, petitioner was unable to defend the aforesaid proceedings, but petitioner believes that he has a good and legal defense to such action, and if given

an opportunity, petitioner is satisfied that he will be able to produce proof in support of such defense.

10. Petitioner denies the allegations in the complaint filed in the said cause of action insofar as they allege that the oath made by petitioner to the petition and of renunciation of allegiance to the German Reich was false and that he fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization No. 370-7549 received by petitioner on November 16th, 1933.

11. Petitioner also denies the allegation that at the time he took the oath to the petition for naturalization and the oath of allegiance to the United States of America and renounced his allegiance to the German Reich that he well knew and realized that he was not attached to the principles of the Constitution of the United States and petitioner denies that he did not in fact intend to renounce [fol. 13] his allegiance and fidelity to the German Reich. Petitioner also denies that at the time he took the aforementioned oaths that it was his intention not to bear true faith and allegiance to the Constitution of the United States, and petitioner also denies that he did not take the obligations of oath freely and without any mental reservation or purpose of evasion.

12. Petitioner was born in Brochthausen, Germany, on September 4th, 1906, and came to the United States of America in 1927. He shortly thereafter made the necessary applications for naturalization and on November 16th, 1933, petitioner was admitted to citizenship in the United States. On November 17th, 1936, petitioner was married to his present wife, Hedwig Klapprott, who was and she is an American citizen, and they have one child, Sieglinde, who was born on June 12th, 1940.

13. Ever since petitioner came to this country in the year 1927, he has always lived here and it was never his intention to do anything other than to remain in this country and live here as a citizen of the United States.

14. At the time that petitioner obtained his certificate of citizenship and at all times prior thereto and for many years thereafter, the United States of America was not at war with the German Reich, and during all of that time his affiliations with the German-American Bund and other Germanic organizations were permitted by the Constitu-

tion and Laws of the United States of America and all speeches, writings and other statements made by petitioner were likewise permitted under the right of free speech granted to petitioner under the Constitution and Laws of the United States, and nothing that was ever said by petitioner did in any way directly or indirectly indicate a desire or intention to do or participate in any treasonal act in connection with the United States Government, and particularly did petitioner never by any speeches, actions, writings or acts indicate that at the time that his applica- [fol. 14] tion for citizenship was made and that his certificate of citizenship was entered into, petitioner was guilty of any of the things charged against him in the aforesaid complaint.

15. Petitioner further shows that the judgement entered herein is based only upon the pleadings and the action and was entered without proofs of the allegations of the complaint as without findings of fact and conclusions of law based thereon.

16. Defendent further shows that the allegations of the complaint, even if considered as admitted, by reason of the petitioner's failure to answer the same, do not meet the requirements of the clear, unequivocal and convincing proof required as a basis of the judgment.

Wherefore, petitioner prays that an order be made requiring the United States of America to show cause why the judgment cancelling petitioner's naturalization certificate should not be reopened, set aside or vacated, and petitioner given an opportunity to enter a defense in this cause on the merits.

And your petitioner will ever pray, etc.

Laurence Semel, Attorney for Petitioner.

State of New York,
County of New York, ss:

August Klapprott, being duly sworn, on his oath, according to law, deposes and says:—

1. I am the petitioner mentioned in the foregoing petition and the facts set forth therein are true.

2. I was served with a summons and complaint in the case of United States of America against myself, Civil

Action No. 2190, in which the United States of America was seeking to obtain a judgment revoking and cancelling [fol. 15] the certificate of naturalization No. 370-7549 which was received by me on November 16th, 1933.

3. At the time that I received the summons and complaint, my circumstances were such that it was not possible for me to enter a proper defense, as a result of which a judgment was entered against me on the 21st day of July, 1942, cancelling my aforesaid naturalization certificate.

4. The facts surrounding my failure to enter a defense to the aforementioned action were as follows:— a short time prior to the date of the service of the said summons and complaint upon me, I had been confined in Christ Hospital in Jersey City, New Jersey, having been very seriously ill, suffering from stomach ulcers, the seriousness of which illness was such that I was at times in danger of losing my life and during which time I required two blood transfusions. Upon my release from the hospital, I was in very poor health, as a result of which I was advised to live in a place where I could receive proper rest and relaxation. Since I was in very poor financial circumstances and in view of my affiliations with the German-American Bund, which was at that time the owner of a recreation camp at Andover, New Jersey, known as Camp Nordland, I made arrangements to live at Camp Nordland until such time as my health improved.

5. While living at Camp Nordland and on the 15th of May, 1942, I was served with the summons and complaint in the above-mentioned proceeding. In view of my poor physical condition, I was unable to get around very well and since I was also in very poor financial condition, I had no money with which to retain a lawyer to represent me. In order to obtain some legal assistance, I wrote out and addressed a letter to the American Civil Liberties Union of New York, in which I explained that I had no money with which to retain a lawyer and requested that they arrange for some legal assistance for me. This letter [fol. 16] was in my possession on the day of my arrest and was taken away from me by the Federal Bureau of Investigation, and so far as I know it was never mailed and is undoubtedly in the hands of the United States Department of Justice. I had also drawn up a draft of an

answer to the complaint and was working on it at the time of my arrest, but because of the fact that I was taken into custody, I was unable to complete it and it was left at my home when I was taken away.

6. Before the time expired for filing an appearance and on or about July 7th, 1942, I was taken into custody by the Federal authorities on an indictment which was found against me in the United States District Court for the Southern District of New York, along with many other persons, all of us being charged with a conspiracy to violate the Selective Service Act. Since I had no funds with which to retain an attorney, the court appointed an attorney, by the name of McDonald, to defend me and at that time I brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but I later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against me by default, after having, by his promises, lulled me into a sense of security with respect to this matter.

7. The indictment on the charge of conspiracy to violate the Selective Service Act was tried in New York City and at all times during a very lengthy trial, I was kept in custody under an exceedingly high bail, and since I was unable to furnish such bail and was unable to get around, I was still unable to take any steps in connection with the denaturalization proceedings. I was found guilty of the said conspiracy charge and although an appeal was filed, I continued to remain in custody until June, 1943, at which time I decided to begin the service of my sentence and was transferred to the Federal Correction Institution [fol. 17] at Milan, Michigan. I remained at the said Federal Correction Institution at Milan, Michigan, until January 30th, 1944, when I was transferred to the District of Columbia, having been indicted with twenty-nine other persons in the case of United States vs. Joseph McWilliams, et als., also referred to as "The Sedition Case."

8. The aforesaid sedition case took about eight months of trial and as a result of the untimely death of the Judge, a mistrial was declared sometime about the first part of December, 1944. I was kept in custody continuously thereafter and until November 21st, 1946, when I was released by reason of the fact that the Chief Justice of the District

Court of the United States for the District of Columbia ordered the indictment dismissed, and since there were no further convictions or indictments pending against me, I was released, but I was then immediately remanded to custody for the purpose of deportation, and I am at present confined at Ellis Island, New York, awaiting the pleasure of the United States Government with respect to my possible deportation.

9. During the month of July, 1945, I and a number of other persons instituted an action in the District Court of the United States for the District of Columbia, in an effort to obtain an injunction against the Department of Justice to prevent deportation, but that relief was denied by the District Court and the United States Court of Appeals in the District of Columbia, and the United States Supreme Court also denied certiorari on December 9th, 1946.

10. My reasons for failing to file an answer or enter an appearance in the aforesaid denaturalization proceedings are set forth above, but I wish to reiterate that it was never my intention to permit this matter to go by default. Since I was seriously ill, physically, and since I was in custody during all of the time abovementioned, and since I had no financial means of obtaining proper legal repre-
[fol. 18] sentation, I was unable to defend the aforesaid proceedings, but I believe that I have a good and legal defense to such action, and if given an opportunity, I am satisfied that I will be able to produce proof in support of such defense.

11. I deny the allegations in the complaint filed in the said cause of action insofar as they allege that the oath made by me to the petition and of renunciation of allegiance to the German Reich was false and that I fraudulently and illegally obtained an order for admission to citizenship, and the certificate of naturalization No. 370-7549 received by me on November 16th, 1933.

12. I also deny the allegation that at the time I took the oath to the petition for naturalization and the oath of allegiance to the United States of America and renounced my allegiance to the German Reich that I well knew and realized that I was not attached to the principles of the Constitution of the United States and I deny that I did not in fact intend to renounce my allegiance and fidelity to the German Reich. I also deny that at the time I took the

aforementioned oaths that it was my intention not to bear true faith and allegiance to the Constitution of the United States, and I also deny that I did not take the obligations of oath freely and without any mental reservation or purpose of evasion.

13. I was born in Brochthausen, Germany, on September 4th, 1906, and came to the United States of America in 1927. I shortly thereafter made the necessary applications for naturalization and on November 16th, 1933, I was admitted to citizenship in the United States. On November 17th, 1936, I married my present wife, Hedwig Klapprott, who was and she is an American citizen, and I have one child, Sieglinde, who was born on June 12th, 1940.

14. Ever since I came to this country in the year 1927, I have always lived here and it was never my intention [fol. 19] to do anything other than to remain in this country and live here as a citizen of the United States.

15. At the time that I obtained my certificate of citizenship and at all times prior thereto and for many years thereafter, the United States of America was not at war with the German Reich, and during all of that time my affiliations with the German-American Bund and other Germanic organizations were permitted by the Constitution and Laws of the United States of America, and all speeches, writings and other statements made by me were likewise permitted under the right of free speech granted to me under the Constitution and Laws of the United States, and nothing that was ever said by me did in any way directly or indirectly indicate a desire or intention to do or participate in any treasonal act in connection with the United States Government, and particularly did I never by any speeches, actions, writings or acts indicate that at the time that my application for citizenship was made and that my certificate of citizenship was entered into, I was guilty of any of the things charged against me in the aforesaid complaint.

August Klapprott.

Sworn to and subscribed before me this 12th day of December, 1946. Alice G. Palmer, Notary Public, State of New York, Residing in N. Y. Co. No. 271. Reg. No. 547-F-7. Commission expires March 30, 1947.

[fol. 20] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE

This matter being opened to the court by Laurence Semel, attorney for defendant, and the court having read and considered the petition and verifying affidavit filed by the defendant in the above cause, it is, on this 6th day of January, 1947,

Ordered, that the United States of America do show cause before this court, to be holden at the United States Court House, Federal Square, Newark, New Jersey, in Court Room No. 3, on Monday, the 27th day of January, 1947, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why the prayers in the aforementioned petition should not be granted, and it is further

Ordered, that true but uncertified copies of the petition, affidavit and this order be served upon the United States District Attorney for the State of New Jersey, within 7 days from the date hereof.

William J. Smith, Judge.

[fol. 21] IN UNITED STATES DISTRICT COURT

OPINION

SMITH, District Judge:

This is a civil proceeding instituted by the United States Attorney, pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A. 738, to revoke the order admitting the defendant to citizenship and to cancel the certificate of naturalization issued thereon on the grounds of fraud and illegality.

The original complaint, filed on May 12, 1942, charged that the certificate of naturalization was illegally and fraudulently procured and sought its cancellation on these grounds. The summons and complaint were personally served upon the defendant on May 14, 1942. The defendant failed to appear and defend within the time prescribed in the summons, to wit, sixty days, and a default judgment in conformity with the prayer of the complaint was entered on July 16, 1942. Thereafter no action was taken by the defendant until the present petition was filed on January 7, 1947.

The proceeding is now before the Court on the verified "petition" of the defendant to open, vacate and set aside the default judgment entered herein. The authority of the Court to grant relief at this time is challenged by the plaintiff.

It clearly appears from the affidavit of the defendant that his failure to appear and defend within the time prescribed was imputable to his own willful and inexcusable neglect. The excuses belatedly advanced in his affidavit, to wit, illness, confinement, and lack of opportunity, are not persuasive. We shall, however, consider, the excuses in the light most favorable to the defendant, and, notwithstanding our firm conviction to the contrary, assume that the default was ascribable to his "mistake, inadvertence, surprise, or excusable neglect." Even this assumption is of no avail to the defendant.

[fol. 22] Rule 60(b) of the Rules of Civil Procedure, 28 U. S. C. A., foll. 723(c) specifically preserves the traditional authority of the Court, on motion, to "relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." This rule, however, imposes a mandatory limitation on the time within which the motion shall be made. It is therein provided that the "motion shall be made within a reasonable time, *but in no case exceeding six months after such judgment, order, or proceeding was taken.*" (Emphasis by the Court.) There is no discretionary power in the Court to extend this period of limitation. It necessarily follows that the present petition, regarded as a formal motion under the said rule, is barred.

The said rule, however, expressly excepts from its application the power of the Court "to entertain an action to relieve a party from a judgment, order or proceeding." This exception, liberally interpreted, preserves the historic authority of the Court to entertain either a bill of review or a bill in the nature of a bill of review in a proper case. Fraser v. Doing, 130 F. 2d 617, 620; Wallace v. United States, 142 F. 2d 240, 244; Moore's Federal Practice, Vol. 3, Pgs. 3255-3276. These equitable remedies, as thus preserved, are still governed by the established principles of the common law.

The present "petition," notwithstanding its form, should be regarded as a bill of review, and we shall so regard it. It is our opinion, however, that as such it is not maintainable for two reasons: first, the lack of grounds sufficient to sustain it; and second, the inexcusable delay of the defendant in pursuing the remedy. It is well established that the presence of either reason requires the dismissal of the bill. [fol. 23] A bill of review, as an equitable remedy under the common law, had its origin in the first Ordinance of Lord Chancellor Bacon.[1] The general rule adopted by our courts is the same as the Ordinance in legal effect. Whiting v. Bank of the United States; 13 Pet. 6, 14 (38 U. S.). It is now well established that a bill of review is maintainable on only two grounds: "first, error of law apparent on the face of the record without further examination of matters of fact; and second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result."[2] Scotten v. Littlefield, 235 U. S. 407, 411. Accord: Shelton v. Van Kleeck, 106 U. S. 532, 534; Nickle v. Stewart, 111 U. S. 776; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 7; Cocke v. Copenhaver, 126 Fed. 145, 147; Dowagiac Mfg. Co. v. McSherry Mfg. Co., 155 Fed. 524, 527; Rudolph v. Hunt, 286 Fed. 1007, 1009; Simonds v. Norwich Union Indemnity Co.,

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[1] "No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise." Street, Equity Practice (1909), Vol. 2, 1256; Purcell v. Miner, 4 Wall. 513, 521.

[2] It appears from several of the later cases that fraud is now considered a proper ground upon which to predicate a bill of review. The formal distinction between a bill of review and a bill in the nature of a bill of review is disregarded. See Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238.

73 F. 2d 412, 415; Irvin v. Buick Motor Co., 88 F. 2d 947, 949; Brady v. Beams, 132 F. 2d 985, 986; Lehman Co. v. Appleton Toy & Furniture Co., 148 F. 2d 988, 989. The bill of review ("petition"), in the instant case presents neither of these grounds.

It is contended by the defendant that "the allegations of the complaint, even if considered as admitted, by reason of the (defendant's) failure to answer the same, do not meet the requirements of the clear, unequivocal and con- [fol. 24] vincing proof required as a basis of the judgment." This contention presupposes that a default judgment may be entered only upon proof of the allegations of the complaint, and with this we cannot agree. The allegations of the original complaint were sufficient to support the charge that the certificate of naturalization was illegally and fraudulently procured. The failure of the defendant to appear and answer these allegations within the time prescribed was an implied admission of the ultimate facts sufficient to warrant the entry of judgment by default.

The present "petition" must be considered a bill of review for error of law apparent upon the record, no other ground except that hereinabove quoted having been urged. The remedy is not restricted as to time by any mandatory limitation but is governed by the equitable doctrine of laches. The courts, however, have uniformly held that a bill of review for error of law apparent upon the record is in the nature of a writ of error and ordinarily must be brought within the time limited for an appeal. Esminger v. Powers, 108 U. S. 292, 302; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 227; McDonald v. Whitney, 39 Fed. 466, 467; Halsted v. Forrest Hill Co., 109 Fed. 820, 823; Cocke v. Copenhaver, supra; Hagerott v. Adams, 61 F. 2d 35, 36; Peeke v. Citizens Banking Co., 81 F. 2d 112, 114. The analogy has apparently prompted the adoption of the time limited for an appeal as a reasonable limitation on the remedy. Ibid.

This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his willful and inexcusable neglect. The action must, therefore, be dismissed because of the defendant's laches. It is our opinion that the defendant's initiation of this action at this late date was not prompted by any desire to

assume the duties of citizenship but by a recent realization of the serious consequences attendant upon the loss of its [fol. 25] privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

The defendant's verified "petition" presents nothing more than a defense which should have been presented in the original proceeding. This defense cannot be urged at this time as a ground for relief from the judgment entered therein. Helms v. Holmes, 129 F. 2d 263, 265; In re Innis, 140 F. 2d 479, 481. The jurisdiction of equity cannot be invoked except on the grounds hereinabove discussed.

The defendant's petition shall be dismissed. The plaintiff shall prepare and submit forthwith a proper order of dismissal.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITION

This matter having come on to be heard on petition of the defendant to open, vacate and set aside the default judgment entered against him herein, and objection to said petition having been presented by Edgar H. Rosshach, United States Attorney for the District of New Jersey (by Edward V. Ryan, Assistant United States Attorney) in the presence of Laurence Semel, attorney for defendant, on several grounds including the challenge to the jurisdiction of this court at this time; now therefore, in accordance with the views expressed in the opinion filed in this matter February 7, 1947.

It is on this 17th day of February, 1947, Ordered that the petition filed herein on January 6, 1947, by which defendant seeks to have the judgment entered against him on July 17, 1942 vacated, and the order to show cause entered herein January 7, 1946, which is based on said petition, be and the same are hereby dismissed.

William J. Smith, United States District Judge.

Consent is hereby given to the form of the above Order.

Laurence Semel, Attorney for Defendant.

[fol. 27] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given this day of March, 1947, that August Klapprott hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the judgment of this Court entered on the 18th day of February, 1947, in favor of United States of America against said August Klapprott.

August Klapprott, Attorney pro se.

Service acknowledged March 17, 1947.

Edgar H. Rossbach, U. S. Attorney.

[fol. 28] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

NOTICE OF MOTION TO DISMISS APPEAL

To August Klapprott, Appellant c/o Immigration & Naturalization Service, Ellis Island, New York City, N. Y. and P. Bateman Ennis and W. Clifton Stone, Esquires, Attorneys for Appellant, Shoreham Building, Washington, D. C.

SIRS:

Please take notice that on Monday, June 16, 1947 (D. S. T.) at 10:30 o'clock in the forenoon, or as soon thereafter as the matter shall be heard, we shall move before the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, at the Federal Building, Philadelphia, Pennsylvania, for an order requiring the appellant herein to post bond for security for costs on this appeal forthwith or in the alternative, that the above appeal be dismissed for failure to file such bond on appeal.

Edgar H. Rossbach, United States Attorney, by Edward V. Ryan, Assistant United States Attorney.

Endorsements: Notice of Motion by Appellee to Dismiss Appeal. Received & Filed June 11, 1947. Wm. P. Rowland, Clerk.

[fol. 29] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Appeal No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

ON NOTICE OF MOTION TO DISMISS APPEAL

Affidavit

STATE OF NEW JERSEY,
County of Essex, ss:

Edward V. Ryan, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am an Assistant United States Attorney for the District of New Jersey, and in active charge of the above matter on behalf of the United States.

2. On June 9, 1947, I forwarded a copy of a notice of motion to require the appellant herein to file bond on appeal, or in the alternative, for dismissal of such appeal, to P. Bateman Ennis, Esquire and W. Clifton Stone, Esquire, attorneys for the appellant, by placing such notice in an envelope addressed to Collins and Ennis, Esquires; Attention of: P. Bateman Ennis and W. Clifton Stone; Shoreham Building, Washington, D. C., which envelope required no postage and which envelope and contents were then and there deposited by me in the United States mail at the main Post Office, Newark, New Jersey.

Edward V. Ryan, Assistant United States Attorney. Sworn and subscribed to before me this 10th day of June, 1947. Adeline Brunkhorst, Notary Public of New Jersey.

Endorsements: Affidavit in Support of Motion to Dismiss Appeal. Received & Filed June 11, 1947. Wm. P. Rowland, Clerk.

[fol. 30] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT—OCTOBER TERM, 1946

No. 9382

UNITED STATES OF AMERICA,

vs.

AUGUST KLAPPROTT, Appellant

And afterwards, to wit, the 16th day of June, 1947, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur Motion to Dismiss Appeal, before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich and Honorable Harry E. Kalodner, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of June, 1947, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following Order:

[fol. 31] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

AUGUST KLAPPROTT, Defendant-Appellant

ORDER PERMITTING FILING OF APPEAL BOND OUT-OF-TIME

Before Maris, Goodrich and Kalodner, Circuit Judges

After hearing Counsel on both sides in connection with Appellee's motion to dismiss,

It is ordered that Appellant be, and he hereby is, given leave to file an appeal bond out-of-time in the District Court of the United States for the District of New Jersey, in

order to perfect his appeal in the above entitled case; said bond to be filed on or before June 20, 1947.

By the Court, Maris, Circuit Judge.

June 17, 1947.

Endorsements: Order Permitting Filing of Appeal Bond Out of Time. Received & Filed June 17, 1947. Wm. P. Rowland, Clerk.

[fol. 32] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 16th day of October A. D. 1947, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Biggs, Circuit Judge.

Endorsements: Order Assigning Hon. Albert Lee Stephens for Argument. Received & Filed Oct. 16, 1947. Ida O. Creskoff, Clerk.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

v.

UNITED STATES OF AMERICA

Appeal from the Order of the District Court of the United States for the District of New Jersey

Argued October 16, 1947

Before Albert Lee Stephens, Goodrich and O'Connell, Circuit Judges

OPINION OF THE COURT—Filed January 12, 1948

By GOODRICH, Circuit Judge:

The proceeding out of which this appeal comes was one to reopen and readjudicate a cause in which the naturalization certificate of the appellant, August Klapprott, had been cancelled.[1]

Klapprott filed a petition on January 6, 1947, to reopen the proceedings. His allegations assert the following facts: [fol. 34] On May 12, 1942, the United States District Attorney[2] commenced proceedings in the District Court of New Jersey to obtain the revocation of Klapprott's citizenship

[1] The statutory background is: 54 Stat. 1158 (1940), 8 U.S.C.A. § 738 (1942).

[2] Section 338 (a) of the Nationality Act of 1940 provides: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in sub-section (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured." 54 Stat. 1158 (1940), 8 U.S.C.A. § 738(a) (1942).

on the ground that fraud had been practiced in its procurement. Klapprott had sixty days within which to answer the complaint. On the fifty-second day of that period he was taken into custody by agents of the Federal Bureau of Investigation and transferred to New York to stand trial on an indictment which alleged conspiracy to violate the Selective Service Act. On July 17, 1942, the Federal District Court in New Jersey, on motion of an United States Attorney, entered a default judgment which vacated and set aside appellant's naturalization decree. Four and one-half years later appellant commenced this proceeding to set aside or open that default judgment. The petition was dismissed by the District Court, following argument thereon and the filing of an opinion.

Our questions involve both the substantive law governing denaturalization and procedural problems under the Federal Rules. We think the case can be simplified by getting the questions concerning the statute out of the way first.

The appellant claims three errors with regard to the procedure followed by the Government in his denaturalization. He says, first, that a judgment by default cannot be taken in such proceedings. Second, he says, that in any event, proof of the charges is required before a default judgment is entered. In the third place, he says that in the denaturalization proceeedings he was not represented by counsel, as a result of which his constitutional rights [fol. 35] were violated. If any of these points can be maintained there is basis for argument that there was error on the face of the record which might be the foundation for a bill of review, a point discussed later in this opinion.

We think no one of the points is valid. While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service.[3]

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[3] "(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had

This certainly indicates that the problem of a non-resident or absent defendant was in the mind of the law makers. This, plus the fact that a judgment by default is a matter of course in any civil case where the defendant does not answer, together with the universal language of Rule 55 of the Rules of Civil Procedure, support the conclusion that a judgment by default is proper in such cases.

Klapprott's second point is that the Government should have been put to its proof before judgment by default was taken. It was argued that in divorce cases, which involve an important change of status, proof must be made and in certain types of other cases the amount of damages has to be proved before judgment can be entered. The analogies will not hold. Divorce procedure requires submission of proof because, theoretically, the state is concerned. Here the public interest is represented by the Government of the United States whose law officer initiates and conducts the proceeding. Proof is required in unliquidated damage cases because no one ever thinks that a general claim for damages represents anything but the plaintiff's limit of possible recovery and a money judgment has to be entered for some definite amount. The question of whether the facts have [fol. 36] to be proved in a default denaturalization has been raised in the Second Circuit and passed upon there adversely to the appellant's contention. United States v. Borchers, 163 F. 2d 347 (C.C.A. 2, 1947), cert. denied — U.S. — (Oct. 27, 1947). We agree with the Second Circuit.

The appellant's third point is more elaborate. Spelled out it is that the Supreme Court has specified the nature of necessary proof in denaturalization proceedings, requiring it to be "clear and unequivocal".[4] This, it is argued, is like the nature of the proof required in a criminal trial.

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his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought." 54 Stat. 876 (1940), 8 U.S.C.A. § 738(b) (1942).

[4] This was the language used by the Supreme Court in two cases in which the defendant had filed an answer and contested the issue. Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

Therefore, denaturalization proceedings should be treated as though they were criminal and, if so, defendant is entitled to counsel. Since Klapprott had no counsel at the time default was taken against him the argument concludes that he is deprived of his constitutional rights.

There is little weight in this argument. In other situations in the law courts have laid down requirements of a higher degree of proof than the mere preponderance of the evidence presented but no one thinks the proceedings become criminal trials on that account. Thus there is authority that when one attacks a release he has the burden of sustaining his allegations by clear, precise and indubitable proof.[5] The same is true in certain types of claims based on fraud.[6] The Congress, in regulating the acquisition and loss of citizenship rights has made such proceedings civil[7] and we think the action is not changed into a [fol. 37] criminal prosecution by the fact that the Supreme Court has pointed out the necessity of clear evidence in a contested case to take away citizenship rights.

We think, therefore, that the appellant is a long way from showing any error on the face of the record which would entitle him to reopen it and make the Government prove that he made false statements when he took the oath of citizenship. He says it is not true that at that time he made false statements and he denies that he gained his citizenship by fraud. It is relevant at this point to state the additional allegations in his favor which appear from his affidavit and the petition prepared by his counsel. He alleges that at the time of his arrest in New Jersey he was at a Bund Camp recovering from an illness. On the day of his

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[5] Doneyho v. Scottdale Connecting R. Co., 330 Pa. 207, 199 Atl. 162 (1938); Vogel v. Taub, 316 Pa. 41, 173 Atl. 270 (1934); cf. Probate Court v. Enright, 79 Vt. 416, 65 Atl. 530 (1907).

[6] Burley v. Davis, 132 Conn. 631, 46 A. 2d 417 (1946); Lundie v. Walker, 126 N. J. Eq. 497, 9 A. 2d 783 (1939); Fellman v. Henderson Building & Loan Ass'n of Jersey City, 120 N. J. Eq. 367, 185 Atl. 495 (1936); New York Life Ins. Co. v. Brandwene, 316 Pa. 218, 172 Atl. 669 (1934).

[7] Cf. Sourino v. United States, 86 F. 2d 309 (C.C.A. 5, 1936), cert denied 300 U.S. 661 (1937); United States v. Wezel, 49 F. Supp. 16 (D.C. Ill. 1943).

arrest, he says, he had on his person a letter addressed to the American Civil Liberties Union in New York asking its help in defending him in the denaturalization proceedings to which he had been summoned. This letter was taken from his person when he was arrested and taken to New York for trial. He says that in New York he asked the lawyer appointed to defend him in the criminal trial to investigate the matter of the denaturalization proceedings in New Jersey and the lawyer said he would, but that nothing ever happened. Then, finally, he says, he was convicted in New York and subsequently elected to begin service of his sentence. That conviction was ultimately reversed by the Supreme Court.[8] But he was immediately arrested with others and went through a long trial in the well publicized "sedition" case in Washington, which was ended by the death of the trial judge while the case was going on. He states that it was not until the nolle prosequi of the case in Washington and the reversal of the New York conviction that he was freed from criminal charges and could give his attention to the proceedings out of which he lost his citizenship.

[fol. 38] We think none of what the appellant has said brings him within the established rules for reopening a finished piece of litigation. Furthermore, we do not think he presents the type of case where new law should be made to assist him in such reopening.

Our starting point here is, of course, Rule 60 (b) of the Rules of Civil Procedure, set out in full in the margin.[9]

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[8] The ground of reversal was that the evidence was insufficient to support the allegations that there existed a conspiracy to counsel others to evade service in the armed forces of the United States. Keegan v. United States, 325 U. S. 478 (1945).

[9] "(b) Mistake; Inadvertence; Surprise; Excusable Neglect. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation.

Perhaps the Klapprott petition could be treated as a motion; perhaps it could be argued that thus treated it sets up a case of "mistake * * * or excusable neglect". But by the very terms of the Rule a motion on such grounds must be filed within six months after judgment, not four and one half years.

The only possible theory on which there is anything more to say about reopening this case would be on the basis of the last sentence in Rule 60(b). The part we are concerned with is the clause "This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding * * *." There has been not a little argument as to what is involved in this sentence. The opinion now is that it preserves the old common law and equitable remedies available to a party for opening up a judgment after the term.[10]

[fol. 39] This is not only the current course of decision, but has been fully worked out by Professor Moore, assisted by Elizabeth Rogers, with characteristic exactness in a most helpful article called "Federal Relief From Civil

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This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified."

[10] Wallace v. United States, 142 F. 2d 240 (C. C. A. 2, 1940); accord Sharlot v. Ford Motor Co., 9 Fed. Rules Serv. 60(b), 31 Case 1 (E. D. N. Y. 1945). There is no requirement that the appellant set forth for which remedy his motion is a substitute, but the rule makers, by means of the reservation which they wrote into the rule, merely recognized a power which already existed rather than created new ones or enlarged the old ones. Fraser v. Doing, 130 F. 2d 617 (App. D. C. 1942). While it is not necessary for a person seeking relief to meet a denial thereof, unless he can point to a case in which the precise situation was presented, we think he must demonstrate the relief sought by him is of the character recognized by the former writs. These are our guideposts in determining whether the case is proper for disturbing the finality of the judgment.

Judgments."[11] These remedies were bills of review, bills in the nature of bills of review, writ of audita querela, and writs of error coram nobis, or coram vobis. The Court will modestly refrain from appropriating the results of Professor Moore's research and offering those results as its own. It appears that the types of situations in which one or more of these procedural devices was available to reopen a judgment are classified, roughly, into four groups: (1) errors of law apparent on the face of the record; (2) matters arising subsequently to an entry of a judgment; (3) newly discovered evidence or fraud in the procuring of the judgment; (4) matters of fact which had not been put in issue or passed on and which were material to the validity and regularity of the proceeding itself.[12]

It is perfectly clear that when one goes over the allegations of the Klapprott petition, taking all the statements as true, there is not a thing in them which fits the set of facts there presented into any situation on which relief could be given within the bounds of these well established, but not so well known, remedies. The same is true when one checks the allegations with the grounds for opening up a judgment set out in the Restatement of Judgments, §§ 120-123, inclusive. The conclusion on this phase of the matter is that Klapprott has not shown alleged facts which brings [fol. 40] him within any of the rules heretofore established for opening up judgments duly entered.[13]

Nor do we see such equity in the appellant's situation as would induce us to create new remedies for him, even if

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[11] 55 Yale L. J. 623 (1946).

[12] See Moore, Federal Relief From Civil Judgments, 55 Yale L. J. 623, 659-682 (1946); 8 Cyc. of Federal Proc. (2d ed. 1943) §§ 3614, 3615.

[13] We reach this conclusion without regard to the answer to the question whether such proceedings would constitute a suit against the United States, not to be brought without the Government's consent. Compare Zegura v. United States, 104 F. 2d 34 (C. C. A. 5, 1939), cert. denied 308 U. S. 586 (1940) (such proceedings require governmental consent); United States v. Haas, 58 F. Supp. 179 (D. C. N. D. N. Y. 1944) (same), with Jones v. Watts, 142 F. 2d 575 (C. C. A. 5, 1944) (such consent is not necessary); United States v. Sotis, 131 F. 2d 783 (C. C. A. 7, 1942) (same).

we had the power. While Klapprott says that he did not lie when he was naturalized, the great emphasis in all the argument made for him is to the effect that he does not believe the Government now would be able to prove its case against him. This does not seem to us a very powerful reason for opening a stale case. He does not suggest that he did not know the nature of these proceedings that cancelled his citizenship. And the most that he did in preparation for them was to, on his own statement, write a letter to the American Civil Liberties Union which he never mailed. There is no fraud or intimidation suggested. On his own statement he asked for no help except on the one occasion when he asked a court appointed lawyer in New York to see about a proceeding in New Jersey. When nothing was done he did not follow it up.[14] It is quite evident that his citizenship becomes more valuable now that the war has been concluded. Germany has lost and the possibility of deportation is not a gratifying prospect.[15] We think that the rule of law which limits the bases on which litigation long since closed is to be reopened is properly applied in this case.

The order will be affirmed.

[fol. 41] O'Connell, Circuit Judge, concurring:

While there can be no doubt that a default judgment may be entered in a proceeding to cancel a certificate of citizenship, I believe that where such judgment is not based upon the presentation of evidence *ex parte*, every consideration possible should be given to the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow.

It is apparent from the record that the court below had this principle in mind; for sweeping aside the technicalities,

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[14] See Restatement, Judgments § 126(2) (a), (c), (e), (f) (1942).

[15] But even at this late date Klapprott still has a proceeding in which he may be heard before a deportation order is issued against him. See In re Enemy Alien Hearing Boards, Circular No. 3616, December 13, 1942, Department of Justice, Washington, D. C.; Circular No. 3616, Supp. No. 1, January 7, 1943; Department of Justice, Washington, D. C.; cf. Citizens Protective League v. Clark, 155 F. 2d 290, 295 (App. D. C. 1946).

the district judge considered the equities of petitioner's cause. Undoubtedly the granting or denial of Klapprott's petition was a matter within his discretion, and on the basis of the record before us, I am not prepared to say that there was an abuse of that discretion. I note that Klapprott waited more than four years after the entry of the default judgment to attack its validity; and, while it is his contention that he lacked the necessary liberty and funds to pursue his petition at an earlier date, no such difficulties apparently prevented his participation with others in litigation to enjoin the Department of Justice from deporting him. See Citizens Protective League v. Clark, 155 F. 2d 290 (App. D. C., 1946), cert. den. 329 U. S. 787 (1946). I note further that, only three days after certiorari had been denied in the Citizens Protective League case, *supra*, Klapprott found himself able to present the instant petition through able counsel. There being ample evidence in the record before us to justify the finding of the court below that Klapprott had been guilty of laches, I am constrained to agree with the conclusion that the order of the district court should be affirmed.

STEPHENS, Circuit Judge, dissenting:

I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being ad-
[fol. 42] duced in open court. I hold that, in the circumstances of this case, the default should be set aside.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9382

AUGUST KLAPPROTT, Appellant,

v.

UNITED STATES OF AMERICA

Present: Albert Lee Stephen, Goodrich and O'Connell, Circuit Judges.

On Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

Fore the Court, Herbert F. Goodrich.

January 12, 1948.

Endorsements: Order Affirming Order of the District Court. Received & Filed Jan. 12, 1948. Ida O. Creskoff, Clerk.

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9382

UNITED STATES OF AMERICA

vs.

AUGUST KLAPPROTT, Appellant.

Upon consideration of the application by counsel for appellant,

The time for filing a petition for rehearing in the above-entitled cause is hereby extended to February 11, 1948.

Matis, Circuit Judge.

January 26, 1948.

Endorsements: Order Estending Time for Filing Petition for Rehearing. Received & Filed Jan. 26, 1948. Ida O. Creskoff, Clerk.

[fol. 45] UNITED STATES OF AMERICA
Eastern District of Pennsylvania
Third Judicial Circuit, Set.:

I, Harriet G. Humphrys, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this court, in the case of United States of America vs. August Klapprott, Appellant, No. 9382, on file, and now remaining among the records of the said Court, in my office

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of March in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-second.

Harriet G. Humphrys, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 17, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7719)

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 732

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In The

Supreme Court of the United States

No.

August Klapprott, *Petitioner*

vs.

United States of America, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

August J. Klapprott, presently confined on Ellis Island, New York Harbor, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, decided January 12, 1948. The Third Circuit affirmed the judgment of the United States District Court for the State of New Jersey, entered February 17, 1947, finding against petitioner in his effort to set aside a default judgment of July 17, 1942, cancelling and revoking his certificate of citizenship. The majority opinion was written by Circuit Judge Herbert F. Goodrich and concurred in by Circuit Judge John J. O'Connell, *while Circuit Judge Albert Lee Stephens, of the Ninth Circuit, sitting by special designation, dissented.*

The instant cause emanated from a default judgment entered in the District Court of the United States for

the State of New Jersey, on July 17, 1942, cancelling and revoking petitioner's certificate of citizenship. The complaint served upon petitioner to cancel and revoke his citizenship had to be answered within a period of sixty (60) days, but on the fifty-second day of that period, he was taken into custody by agents of the Federal Bureau of Investigation and transferred to New York to stand trial on an indictment which alleged conspiracy to violate the Selective Service Act (R 33). The basis of the default judgment was petitioner's failure to file an answer to said complaint within the 60-day period after service, although the United States Attorney's Office in Newark should have known, that several days prior thereto petitioner had appeared before the United States Commissioner at Newark, New Jersey, and, was removed to New York City where he was held under $25,000.00 bond to stand trial in a criminal case, brought against him by the United States of America, which Government was likewise the plaintiff in the citizenship proceeding instituted against petitioner in another, distinct and separate jurisdiction.

OPINIONS BELOW

The opinion of the District Court is set forth (R 21a) as is the opinion of the United States Circuit Court of Appeals for the Third Circuit (R 32).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

QUESTIONS PRESENTED

1. Were petitioner's constitutional rights abridged when, approximately eight days prior to the time for answering the civil complaint filed by the United States Attorney for the Northern District of New Jersey to revoke and cancel his certificate of citizenship, he had been indicted in another Federal jurisdiction, removed from New Jersey and held in New York under $25,000.00 bond which he was unable to raise to effect his release, of necessity rendering it impossible for him to appear in Court because he was detained in another jurisdiction, nevertheless the authorities in New Jersey proceeded to take a default judgment against him because of failure to answer the complaint or to appear in the District Court of the United States for the State of New Jersey?

2. Was petitioner justifiably charged with laches for failing to take steps to reopen his citizenship case while confined in jail for approximately four and one-half years under sentence and another criminal indictment?

3. Should a default judgment cancelling petitioner's citizenship have been entered without ex parte proof?

4. Were petitioner's constitutional rights violated by the failure of the Court to appoint counsel to represent him, or to investigate his case after he had been removed to another jurisdiction and held under a bond of $25,000.00?

STATEMENT OF FACTS

This is an action instituted by petitioner during January, 1947, to set aside and vacate the judgment of the District Court of the United States for the State of New Jersey, of July 17, 1942, cancelling his certificate of citizenship. On October 14, 1942, petitioner was served with a complaint to cancel his citizenship. The action was instituted by the United States Attorney for the

District of New Jersey and filed in the United States District Court, Newark, New Jersey. At time of service of complaint, petitioner was residing in the County of Essex, State of New Jersey, where he was recuperating from an illness (R. 9a). He had been an active member of the German American Bund, and because of that past association, as well as lack of financial means, he found it extremely difficult to obtain counsel to represent him in the defense of the charges filed (R 10a). According to the complainf, Klapprott had sixty (60) days in which to file an answer or plead in some manner to the charges. Approximately eight (8) days prior to the expiration of the time to answer said complaint, he and many others were indicted by a Federal Grand Jury in New York City, New York; charged them with conspiracy to violate the "Selective Service Act", the case being entitled *United States vs. Wilbur Keegan et al.* Petitioner was promptly arrested by agents of the Federal Bureau of Investigation, certain personal effects were taken from him, and he was subsequently held under *Twenty-Five Thousand Dollars ($25,000.00) bond.* He appeared before the United States Commissioner in Newark, New Jersey. Removal was waived and petitioner was taken to New York City, which fact most certainly should have been known by the Federal authorities in Newark, New Jersey. The proceeding and arrest caused wide publicity. At the time of arrest, petitioner had on his person a letter addressed to the American Civil Liberties Union, which was taken from him by the authorities, the substance of which letter was a request for legal assistance to defend him in the denaturalization proceeding (R 16a). Since petitioner had no funds to employ counsel to defend him in the criminal case in New York City, counsel was appointed by the Court to act for him. He immediately called to

that attorney's attention the matter of the denaturalization proceeding (R 16a) and counsel agreed to look into the same, but apparently failed to do so (R 16a). The United States Attorney's Office in Newark, N. J., should have had knowledge because of wide publicity given the case, that petitioner was no longer in that jurisdiction and was held under Twenty-Five Thousand Dollars Bond in another jurisdiction yet on July 17, 1942, the District Court of the United States for the State of New Jersey (R 7a) was requested to and did enter a default judgment cancelling Klapprott's certificate of citizenship for his failure to answer the complaint within the time limit (R 7a).

Petitioner, with others, subsequently stood trial in New York City, in the case of *United States vs. Wilbur Keegan et al.*, and after a protracted trial was found guilty as charged and sentenced to serve 5 years in prison. This conviction was appealed to the United States Circuit Court of Appeals for the Second Circuit. Subsequently, in June, 1943, petitioner, while still confined and in custody, elected to begin service of the sentence of five (5) years heretofore imposed, and was accordingly transferred to the Federal Correction Institution at Milan, Michigan (R 17a), where he remained until approximately January 30, 1944. Petitioner was then removed to the District of Columbia, where he had been jointly indicted with twenty-nine (29) other defendants in the case of *United States vs. Joseph McWilliams et al.*, (R 17a), referred to as the "Sedition Case", the charge in substance being a conspiracy to undermine the morale of the United States armed forces. The trial of this case began in April, 1944. While the trial was in progress, the United States Circuit Court of Appeals, Second Circuit, on February 29, 1944, affirmed the conviction of petitioner and certain others in the case of *United States vs. Wilbur Keegan et al.*, 141 F. 2d 148. On May 15, 1944, the Supreme Court of the United States granted certiorari, and on June 11, 1945, reversed

petitioner's conviction along with the others. As a result, the five (5) year sentence heretofore imposed on Klapprott was set aside *Wilbur Keegan et al vs. U. S.*, 325 U. S. 348. However, the "Sedition Case" was in progress, and petitioner was confined in jail. After approximately 8 months of constant trial, the "Sedition Case" was halted by the untimely death of the presiding Justice, and a mis-trial declared, but petitioner remained confined in jail in the District of Columbia, where he was detained until approximately November 22, 1946, when Mr. Chief Justice Laws of the District Court of the United States for the District of Columbia dismissed the indictment against petitioner and others. For the first time in approximately four and one half years August Klapprott was removed from all indictments and stood a free man, but not for long. He was immediately apprehended by the Immigration authorities and transferred to Ellis Island, New York, for deportation because of the loss of his certificate of citizenship.

Shortly after removal to Ellis Island, petitioner retained counsel to take steps to reopen his citizenship case (R.40). A hearing on the petition was had January 28, 1947, the Government interposing a challenge to the jurisdiction of the Court. No testimony was taken, and on February 7, 1947, an opinion was filed by the District Court (R 21a), dismissing the proceeding because of petitioner's alleged laches (R 24a). On March 17, 1947, an appeal from the judgment of the District Court was noted, and the matter taken to the United States Circuit Court of Appeals for the Third Circuit. The case was heard by Judges Herbert F. Goodrich, Albert Lee Stephens and John J. O'Connell, on October 16, 1947, and decided on January 12, 1948. The judgment of the District Court was affirmed by a two to one decision (R 32), Judge Stephens dissenting (R 40), stating:

"I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."

Judge O'Connell in a concurring opinion affirming the Court below, stated, however (R 39):

"* * * * * I believe that where such a judgment is not based upon the presentation of evidence ex parte, every consideration possible should be given the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow."

REASONS FOR GRANTING THE WRIT

1. Petitioner's constitutional guarantees were abridged when the United States Attorney's Office took a default judgment cancelling his citizenship on the grounds of failing to answer the complaint while the Government had petitioner confined under an excessive bail in another Federal jurisdiction, which circumstances certainly should have been well known to the United States Attorney's office in Newark, N. J.

2. A default judgment should not have been taken without due notice to petitioner, and under the circumstances he should have had 3 days' notice in compliance with Rule 55 (b) (2), Federal Rules of Civil Procedure.

3. A default judgment should not have been taken without presentation by the Government of clear and unequivocal ex parte proof to support the complaint and affidavit.

4. Petitioner was not justifiably chargeable with "laches" for failing to act, during the period of his incarceration, in an effort to set aside the default judgment; in such a case "laches" should not be applied, particularly where one has been the subject of two indictments such as confronted petitioner for approximately four and one half years which he served in several Federal jails.

5. Cases such as this, predicated on mental reservation at the time of taking the oath of allegiance to the United States, infer a charge of perjury, and in view of the seriousness and the very nature of the proceeding the matter should be considered criminal of nature, and the counsel should be appointed for indigents as provided for by the 6th Amendment of the Federal Constitution.

PRAYER FOR WRIT

Wherefore, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause, so that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

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IN THE

Supreme Court of the United States

No.

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

1. Certiorari should issue to correct the judgment of the Third Circuit Court of Appeals in a case involving an abridgment of petitioner's constitutional rights.

2. Certiorari should issue to correct the judgment of the Third Circuit Court of Appeals, based on the dissenting opinion of Judge Albert Lee Stephens and certain statements contained in the opinion of Circuit Judge John J. O'Connell.

3. Certiorari should issue to determine whether petitioner's certificate of citizenship should have been revoked by a default judgment, particularly without requiring the production of clear and unequivocal ex parte evidence.

4. Certiorari should issue to determine whether petitioner's constitutional rights were abridged when the Government of the United States, having caused petitioner to be indicted and removed to New York, should have known

that it was impossible for petitioner to appear because he was out of the jurisdiction of the District Court of the State of New Jersey and incarcerated in another jurisdiction, proceeded to take a default judgment to cancel and revoke his certificate of citizenship. The said Government of the United States, through the United States Attorney for the State of New Jersey, had sued petitioner in that jurisdiction to revoke his citizenship, and then, approximately 8 days before time to answer said complaint had expired, the Government had indicted petitioner in the jurisdiction of the State of New York and caused his removal from New Jersey to New York.

5. Certiorari should issue to determine whether a suit to cancel and revoke a certificate of citizenship, predicated on mental reservation at the time of taking an oath of allegiance to the United States of America, is in fact a civil or criminal proceeding, and, if criminal, whether counsel should not have been appointed for petitioner as provided by the *Sixth Amendment of the Federal Constitution.**

6. Certiorari should issue to determine whether petitioner can justifiably be charged with laches for failing to take steps to vacate the default judgment cancelling his citizenship, considering the facts, that his citizenship was cancelled by default judgment while in jail; that he was confined for a period of four and one half years thereafter, convicted in one case which was subsequently reversed, and indicted in another case which was subsequently dismissed.

ARGUMENT

August Klapprott was admitted to citizenship in the United States of America on November 16, 1933 (App. 2a) at which time he took the oath of allegiance required for

* All emphasis supplied.

naturalization. *From the date of arrival in America after leaving Germany, the land of his birth, he has not returned to that country* (App. 13a). He was a resident of the State of New Jersey and became associated with the German-American Bund. On November 17, 1936, Klapprott married an American citizen, and one child was born of said marriage (App. 18a). The Complaint filed against petitioner by the United States Attorney for the Northern District of New Jersey to revoke and cancel his citizenship (App. 2a) contained certain allegations most of which in themselves, even if conceded to be correct, would not have been sufficient to support a finding justifying cancellation of petitioner's certificate of citizenship, *had he been in a position to appear in Court to defend the charges.* The statements contained in the complaint were in the main speculative of nature. Paragraph five of said complaint (R 3a) we will quote verbatim for the sake of convenience:

> "The oath made by the defendant to the petition and of renunciation of allegiance to the German Reich was *false* and, thereby, he fraudulently, and illegally obtained an order for admission to citizenship, and the certificate of naturalization (No. 370-7549), which was received by the defendant on November 16, 1933, should be revoked and cancelled for the following reasons:
>
> "At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, the defendant well knew and realized he was not attached to the principles of the Constitution of the United States and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or citizen, and further, that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic, and further that he

did not take the obligations of the oath freely and without any mental reservation or purpose of evasion."

The complaint was executed May 12, 1942, a period of over eight years after petitioner had become an American Citizen; and of necessity the foregoing allegations had to be based and predicated on the contents of paragraph (6) of said complaint, which reads as follows (R 3a):

"In particular and among other things, the plaintiff charges that contrary to the oaths prescribed by law for admission to citizenship, and received and taken by the defendant:

"The defendant is and has been notoriously and openly one of the chief leaders and active members of the German American Bund and its affiliates in and about the District of New Jersey. He has been president of the German-American Bund and director of Camp Nordland; Vice President of the A. V. Publishing Company; member of the Board of the A. V. Development Corporation; head of the Protective Citizens' League, Inc.; trustee for the Eastern Department of National Protective Trustees.

"From time to time and subsequently to 1935, the defendant has made, both in writing and in speeches, numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America.

"The principles of the organizations referred to above are inimical to the Constitution of the United States and to the good order and happiness of the United States, and in fact were propagated and encouraged by the present enemies of the United States including persons who believe in the ideology enunciated by Adolph Hitler and the present ruling party of the German Reich."

At the outset, we feel justified in saying that before having petitioner's citizenship revoked and cancelled, the Government should have produced for the benefit of the

District Court "*clear and unequivocal proof*" to support the allegations contained in paragraphs five and six of the complaint. In the cases of *Baumgartner v. U. S.*, 322 U. S. 665; 87 L. ed. 1525; *Schneiderman* v. *U. S.*, 320 U. S. 118; 87 L. ed. 1796; *Wilbur Keegan et al.* v. *U. S.*, 325 U. S. 478, we sincerely feel that this Honorable Court has heretofore held that ~~such~~ CERTAIN specific acts as described in paragraph six of the complaint (R 7a) filed against Klapprott are not such as in themselves would justify cancellation and revocation of a certificate of citizenship. There are many United States Circuit and District Court decisions which have held likewise, and we are constrained to list various authorities in preface to argument of the points raised in this petition. The cases are as follows:

Meyer v. *U. S.*, 141 F. 2d 825;
U. S. v. *Rossler*, 144 F. 2d 463;
U. S. v. *Sotzek et al.*, 144 F. 2d 576;
U. S. v. *Hauck et al.*, 155 F. 2d 141;
U. S. v. *Bergman*, 144 F. 2d 34;
U. S. v. *Polzin*, 47 F. Supp 476;
U. S. v. *Hartman*, 51 F. Supp 71;
U. S. v. *Geise*, 56 F. Supp 1018;
U. S. v. *Haas et al.*, 51 F. Supp 910;
U. S. v. *Koerner*, 56 F. Supp 242;
U. S. v. *Kusche*, 56 F. Supp 237, and
U. S. v. *Mensing*, 56 F. Supp 253.

In the case of *United States* v. *Polzin*, 48 F. Supp 476, the Court on page 480 said:

> "However, we have no right to cancel citizenship upon mere speculation. *There must be satisfactory proof of fraud or illegality at the time citizenship was granted, because, as the statute now reads, it is only in such instances that citizenship can be taken away.*"

Just what evidence could the Government possibly have produced to the effect that on November 16, 1933, the date Klapprott took the oath of allegiance to the United States of America, he had a mental reservation and therefore perpetrated a fraud on the United States of America in

becoming a citizen of this country? We are confident that such evidence would have been totally lacking.

In the case of *U. S.* v. *Bergman*, 144 F. 2d 34, the Circuit Court in an opinion reversing the lower Court held that citizenship once granted should not be revoked except on *positive proof of fraud.* Allowance should be made for statements made in the heat of passion.

The strictness as to limitations placed upon the Government in denaturalization cases is aptly demonstrated in the case of *United States* v. *Jackson*, 55 F. Supp 517, where the court said that such a suit, though not a "criminal proceeding" is not an ordinary "*civil action*" since it involves an important adjudication of status, and, hence, the Government should be limited, as in a criminal proceeding, to matters charged in the complaint.

In the case of *United States* v. *Heymig*, 50 F. Supp 566, a denaturalization proceeding the Court on P 567 stated:

> "From these excerpts from decisions in other Federal Courts it seems clear to me that the rule not only should be, but is, that evidence of fraud must be clear and convincing to a degree that it satisfies the mind of the Court of the truth of the charges, *beyond a reasonable doubt.*"

At the time of service of the complaint, petitioner was suffering a severe illness, and had been previously hospitalized (R 9a). He was without funds (R 10a) and unable to secure counsel to defend him (R 15a). Eight days before an answer to said complaint was due, petitioner was arrested in New Jersey and afforded a hearing before the United States Commissioner, Newark, New Jersey. Being without funds to employ counsel petitioner agreed to his removal. He was held under an excessive bond of Twenty-Five Thousand Dollars ($25,000.00) in New York City, State of New York (R 16a), where he was detained in the Federal Detention Headquarters and in the Tombs Prison. Petitioner's impoverished

condition precluded raising the necessary funds to make bond in order to effect his release.

After petitioner's removal to New York, the District Court of the United States appointed counsel to represent him in the criminal proceeding, *United States* v. *Wilbur Keegan et al.*, Klapprott immediately called the matter of his denaturalization proceeding to that attorney's attention and he promised to look into the matter (R 16a) but which he apparently failed to do and the default judgment was taken (R 16a).

He was subsequently convicted, with many others, in the case of *U. S.* v. *Wilbur Keegan et al.*, sentenced to five years in prison, and subsequently sent to the Federal Correction Institution at Milan, Michigan, where he remained until approximately January 30, 1944, when he was transferred to jail in Washington, D. C., having been indicted jointly with 29 other persons in the case of *United States* v. *Jos. McWilliams et al.* In the meantime, and after the McWilliams case had begun, the United States Circuit Court for the Second Circuit affirmed the conviction in the case of *United States* v. *Wilbur Keegan et al.*, 141 F. 2d 248. The trial of the McWilliams case, referred to as the "Sedition Case", lasted approximately 8 months, when a mis-trial was declared because of the untimely death of the presiding judge. On November 22, 1946, Mr. Chief Justice Laws of the District Court of the United States for the District of Columbia dismissed the indictment in the "Sedition" case. However, petitioner, although free of all criminal charges, was not released but was remanded to jail and then transfetred to Ellis Island to await the Government's pleasure to deport him. Freed of all criminal charges, after 4½ years in jail, petitioner was finally able to begin his fight to have set aside and vacated the judgment taken by default, cancelling his citizenship.

In the opinion of the District Judge (R 24a), it is stated:

> "This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his wilful and inexcusable neglect. * * *"

In the concurring opinion of the Second Circuit Court of Appeals (R 40) it is stated:

> "There being ample evidence in the record before us to justify the finding of the court below that Klapprott had been guilty of laches, I am constrained to agree with the conclusion that the order of the district court should be affirmed."

We most respectfully disagree with the opinions of the lower courts holding that petitioner under the foregoing circumstances could be justifiably charged with laches. It is urged that petitioner who had been in jail for a period of four and a half years, subjected to long and protracted trials under two criminal indictments, one of which was reversed by this Court and the other dismissed by the District Court and the dismissal sustained on appeal (*McWilliams* v. *U. S.*, 163 F. 2d 695), should not be held to normal restrictions and iron-clad rules as to a time element in his effort to regain his citizenship, which was taken by default, without proof and under extraordinary circumstances.

In the opinion of Circuit Judge John J. O'Connell (R 39), stress seems to be laid on the fact that petitioner's name was included with a group of other names in the case of *Citizens Protective League* v. *Clark*, 155 F. 2d 290, cert. denied 329 U. S. 797 (1946). At the time that case was filed, petitioner was confined, but on the face of the record appeared able to become a party to that proceeding. We sincerely urge that petitioner's apparent participation in that case, with a great number of other persons, does not indicate that he could have at that time proceeded in the instant case. Were the facts in that proceeding part of this record, we could aptly demonstrate his association in

the case. *We respectfully contend that the instant case is one that merits review by this Court*, and, so far as the question of laches is concerned, it should be treated and placed in the same category as the case of *Rene de Meerler* v. *People of the State of Michigan*, Supreme Court Law Ed Advance Opinions, Vol. 90, No. 7, P. 47, which was REVERSED, and the recent case of *Tony Marino* v. *Joseph E. Ragen*, reported in Vol. 92 No. 5 Supreme Court Law Ed Advance Opinions page 203, in which case the judgment below was vacated and the case remanded. In the Rene de Meerler case a period of approximately 15 years had elapsed before the matter was brought to this Court and in the Marino case a period of twenty-two years elapsed. Both case were reviewed and the convictions held to have been in violation of those petitioners' constitutional rights. WE URGE THAT THE KLAPPROTT CASE INVOLVES A SIMILAR ABRIDGMENT OF CONSTITUTIONAL RIGHTS IN THE INCEPTION, WHEN HIS CITIZENSHIP WAS REMOVED BY THE GOVERNMENT THROUGH MEANS OF A DEFAULT JUDGMENT IN THE JURISDICTION OF NEW JERSEY, WHEN AT THE SAME TIME THE GOVERNMENT HAD HIM CONFINED IN ANOTHER JURISDICTION, ALL OF WHICH FACTS MOST CERTAINLY SHOULD HAVE BEEN KNOWN TO THE AUTHORITIES. It is most respectfully contended that, whoever the man had been, and whatever the charge, he should have been notified of the Government's intention to take a default judgment, and transportation under guard should have been provided so that petitioner might be taken from New York State to New Jersey and afforded an opportunity to appear and contest the action taken against him.

There can be no doubt but what under proper circumstances, a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in justifiable cases. In a recent case of *United States* v. *Geisler*,

9 F. R. S. 60 B. 51, involving a cancellation of the defendant's certificate of citizenship, a period of almost four years had elapsed between the entry of a *consent judgment* and his application to set it aside, yet the judgment was set aside by the District Court.

A review of the rather meager record in this case, however, certainly affords a definite basis for statements contained in the opinions of Judge John J. O'Connell and Albert Lee Stephens (R 39-40), referring to default judgments in a case involving citizenship.

There can be no doubt that the delay on the part of petitioner to attempt to set aside the District Court's order of July 17, 1942 (R 7a), cancelling his certificate of citizenship, is imputable to causes beyond his control, as previously set forth, hence we submit the petition was timely. Laches is not a justifiable reason for refusing to consider a motion to set aside a judgment. Where conditions were such as to impute no negligence or neglect to the person in not moving sooner, the right to reopen should be granted. In the opinion of the District Court (R 21a) it appears that the basis of the decision was Klapprott's LACHES in applying for relief. Laches is a substantive defect, although it applies to procedural matters as well. If the court's contention was that it had no jurisdiction, then laches is not necessary to the Court's decision. If, however, laches is an important criterion, then the Court's jurisdiction is not affected and the sequitur is that, because of undue delay, the aggrieved party may not prevail. Such being the decision, can we say that confinement in Federal Prisons under strict security regulations during a war period is laches? Or is it a cause beyond this petitioner's control? Klapprott could not take any affirmative steps until the prison barriers were removed, and it was only while he was held in confinement by the Immigration authorities that he was permitted a period of parole, to rejoin his family and obtain assistance to go forward in his effort to regain his citizenship.

In the case of *Keeler Bros. v. Yellowstone Valley Nat. Bank, supra*, the learned court wrote as follows:

> "* * * Speedy termination of litigation, sometimes invoked as sufficient reason to deny the motion, is not the end, but means, to justice; and delays from defaults, generally more apparent than real, should be penalized by terms rather than by judgments that may be gratuities to plaintiffs and punishments to defendants, having nothing of the ultimate justice therein. Hence courts ought to and do lean to trials of the merits, and to vacate defaults even when only doubtful whether the inference or presumption is repelled or overcome, or, as generally put, doubtful whether the default should be opened. * * *"

Is not this the better view to follow in the administration of justice and particularly in a case involving the most priceless possession of man, his *American Citizenship?* We respectfully urge that the record amply supports the conclusion that petitioner, having been confined in jail for four and one-half years, was not responsible for his delay when one considers all facts and circumstances of his case, and he was not justifiably chargeable with laches. Particularly in a case involving loss of citizenship, *laches should be proven before being applied.*

There is no question that this petitioner suffered a deprivation of his constitutional rights. *Can it then be said, that one whose constitutional rights have been abridged is estopped from protesting such abridgment by any time element, be it one year or ten years? We are confident the answer is in the negative.*

Circuit Judge Stephens in his dissenting opinion in the instant case (R 40) stated:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."

Circuit Judge John J. O'Connell in concurring with the opinion affirming (R 39), however, in referring to default judgments involving citizenship, stated:

> "While there can be no doubt that a default judgment may be entered in a proceeding to cancel a certificate of citizenship, I believe that where such judgment is not based upon the presentation of evidence *ex parte*, every consideration possible should be given to the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow."

Reading the complaint, it is not difficult to realize just how correct and important the foregoing comments of the learned Judges are. We are accordingly constrained to quote certain excerpts from the affidavit attached to the complaint on which the default was predicated (R 5a).

> "* * * In the course of my official duty I have examined the files of the Federal Bureau of Investigation and in cooperation with the Immigration and Naturalization Service of the Department of Justice, I have received from the official files the facts concerning the naturalization proceedings of the subject, August Klapprott."

We respectfully ask, just what were the facts the affiant received? Were they such facts as to support a revocation of citizenship, and, if so, why were they not presented to the District Court, and made part of the record, at the time the default judgment was taken?

Paragraph 3 of said affidavit reads as follows (R 5a):

> "I have this day read the annexed copy of the form of complaint entitled United States of America v. August Klapprott dated May 12, 1942 to which this is attached and *the facts stated therein are true to the best of my knowledge and belief and the sources of the said facts are the official records of the files of the Federal Bureau of Investigation and the Immigration*

and Naturalization Service of the Department of Justice."

There is nothing in the affidavit to the effect that the facts presented were the result of any personal investigation of affiant, but purely on information and belief, and taken from records compiled by some other person. Again we ask, what did the records disclose? Surely this is not the type of "*clear and unequivocal proof*" that should have been produced by the Government. Furthermore, paragraph four of said affidavit seems to support the conclusion that the acceptance of such facts as a basis for denaturalization was predicated on the opinion of the United States Attorney (R 6a).

> "I have been officially advised by the said Thorn Lord, Assistant United States Attorney, that in the opinion of the United States Attorney the facts presented him by me and set out in the annexed form of complaint state a good cause of action under the provisions of Section 738 of Title 8 U. S. C. A. for revocation of the naturalization of August Klapprott."

The sum and substance of the complaint and affidavit appears to be that W. Rulon Paxon, a special agent for the Federal Bureau of Investigation reviewed certain records of that Bureau and of the Bureau of Immigration and Naturalization Service, which records had been compiled by some third person or persons, that he then gave the information obtained to the Assistant United States Attorney, Thorn Lord, who in turn expressed to affiant an opinion that such facts constituted a good cause of action, sufficient to revoke petitioner's citizenship. It appears to us that the District Court Judge was the proper person to decide whether such facts were sufficient to revoke and cancel Klapprott's certificate of citizenship, and, we reiterate, the facts should have been presented at least in form of evidence ex parte even though petitioner was not present, *but most emphatically do we urge that it was the duty of the Government to have Klapprott present, to*

contest and refute such charges and allegations as he saw fit.

Citizenship in the United States of America is most certainly a possession that should not be taken from a person without the production of evidence of a clear and convincing character to warrant its cancellation and revocation.

In *Schneiderman v. United States, supra*, Justice Murphy speaking for the Court said at page 1800 of 87 L. ed.:

> "* * * in an action instituted under paragraph 15 for the purpose of depriving one of the precious rights of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case. For reasons presently to be stated this burden must be met with *evidence of a clear and convincing character* that when citizenship was conferred upon petitioner in 1927 it was not done in accordance with strict legal requirements."

In *Baumgartner v. United States*, supra, Mr. Justice Frankfurter speaking for the Court said at page 1531 of 88 L. ed.:

> "* * * * New relations and new interest flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. * * * That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion. * * *."

It is respectfully called to the attention of this Court that Title 8 U. S. C. A. 738 does not confer a specific

authority to accomplish the cancellation of a certificate of citizenship by means of "default judgment". This appears to be conceded in the majority opinion of the Court below (R 33):

> "While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service * * *."

There can be no doubt but what service can be had by publication under certain restricted conditions. Title 8 U. S. C. A. 738 Par. (b) which reads as follows:

> "The party to whom was granted naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section have sixty days personal notice in which to make answer to the petition of the United States: *and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by laws of the State or the place where such suit is brought.*"

Can it be unequivocally said that the foregoing section of the statute conferred upon the Government the right to proceed by default in Klapprott's case, *when the authorities certainly should have known where he was, and of his inability to be present in the jurisdiction where the default was entered?* We think not. Furthermore, we feel that August Klapprott in his helpless condition should have been served with a written notice of the government's application for default judgment at least 3 days prior to the hearing on such application, as provided for by Rule 55 (b) (2) Rules of Civil Procedure for the District Courts of the United States. We do not contend that the situation petitioner found himself in is incorporated in the foregoing rule, but we do contend that he was in a helpless condition and unable to appear in Court

in one jurisdiction because of detainment in another, the same party proceeding against him in both jurisdictions, then the benefits of the foregoing rule should be applicable and should be complied with and at least the person in charge of petitioner at his place of confinement in New York should have been notified.

It is quite difficult to arrive at a conclusion other than it was error on part of the Government to take a default judgment against Klapprott in view of the extraordinary circumstances and conditions that prevailed. If such an action was error in the inception, and petitioner's constitutional rights were violated by that action on the part of the Government, can it then be justifiably said that by charging him with "laches" for not moving sooner to set aside and vacate the default judgment during a period of confinement, involved in a turmoil of litigation, is the approach to correct the original error which was not his? We think not.

We respectfully urge, in the light of the facts herein, that a default judgment should not have been entered against petitioner, cancelling his citizenship. Since the proceeding is in the nature of a forfeiture, Klapprott should have been afforded the right to at least testify in his own behalf, but circumstances previously set forth precluded that privilege. We further urge, all circumstances and conditions considered, petitioner could not justifiably be charged with "laches" in his effort to regain his citizenship.

CONCLUSION

In the historical development of our Courts, it has always been one of our principles that a man shall have a trial on the merits, where a fundamental right is involved. So much has this been ingrained in our law, our way of life, and our every day approach to civil liberties, that

the Courts have taken every precaution to preserve these most precious rights at all times. Petitioner has a valid and meritorious defense to this action, and can show good faith and excusable neglect if afforded an opportunity.

It is our humble opinion that August Klapprott, having been twice indicted, and during the periods of trial kept incarcerated for approximately four and one half years, was not guilty of wilful or inexcusable neglect in failing to answer the complaint within the prescribed time or during the ensuing period, nor was petitioner negligent in not proceeding expeditiously, in that conditions beyond his control prevented him from applying sooner for relief.

On the basis of the foregoing, therefore, we urge, and it is most respectfully submitted, that the writ of certiorari should issue.

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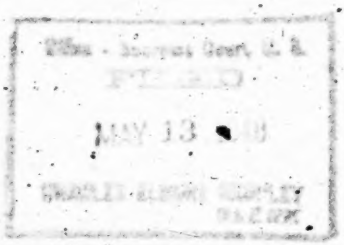

No. 732

IN THE

Supreme Court of the United States

October Term, ~~1947~~ 1948

AUGUST KLAPPROTT,
Petitioner,

v

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

In view of certain allegations contained in respondent's brief, petitioner deems it appropriate to file a reply brief, and while in some instances the matters contained therein perhaps have been included in the main brief, yet we feel the seriousness of the questions involved cannot be overemphasized.

The questions presented in respondent's brief are as follows:

1. *Whether, in the circumstances of this case, the District Court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.*

2. *Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.*

3. *Whether a judgment of denaturalization may be entered by default without a hearing.*

ARGUMENT

Whether, in the circumstances of this case, the District Court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.

In reply to the argument advanced as to question one, we refer to the opinion of the District Court (R 24a) and which clearly indicates that *laches* was the basis for denial of the relief sought. *The Court held that petitioner's failure to move in an attempt to vacate the judgment at an earlier date was entirely imputable to his wilful and inexcusable neglect.* In argument the Government lays stress on the fact that Klapprott did not file an answer to the complaint during the *fifty-two day period that elapsed between the time service was had upon him and the date of his arrest.* Consideration most surely cannot be afforded such contention in that the Complaint clearly stated and the statute so provides, Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, (b) *that petitioner had sixty days personal notice in which to make an answer to the petition of the United States.* No matter what the reason for petitioner's failure to file an answer before the sixty day period had expired, it cannot be considered, in that it made no difference whether he replied on the first or last day of the period; *and no neglect can be inferred from failure to answer the complaint during the fifty-two day period prior to petitioner's arrest.*

It is correct that the record fails to contain or show any effort on part of petitioner to ascertain whether the letter which was taken from his person at time of arrest by the authorities (R 16a) had ever been mailed or received by the American Civil Liberties Union. This particular letter was written in an effort to obtain legal assistance, but whether he did, or did not, inquire if it reached its destination should not be a matter of consideration. When one reflects back to the period of July, 1942, *the arrest of many members of the German-American Bund, Klapprott's indictment with others in New York on a conspiracy charge, Wilbur Keegan et al v. United States, and his removal from New Jersey to New York, held under a bond of Twenty-Five Thousand Dollars ($25,000.00), unable to obtain his release and as result confined in jail, we respectfully submit that petitioner cannot be justifiably charged under such circumstances and conditions with neglect in not seeking information as to what became of the letter.* No doubt jail regulations limited petitioner as to persons with whom he could correspond, and after counsel was appointed to represent him in the conspiracy case, we submit he did the reasonable thing, i. e. he requested his court appointed attorney to inquire into and assist him in the citizenship case (R 16a); *and notwithstanding the fact that counsel agreed to look into petitioner's case, the record supports the conclusion that nothing was done* (R 16a).

In support of the Government's contention that incarceration in prison should not have prevented Klapprott from seeking legal assistance and moving to set aside the default judgment, the case of *United States v. Kuhn et al, 49 F. Supp 407*, is cited. It is stated, that in this case a number of petitioner's co-defendants in the Selective Service conspiracy case were actively defending their denaturalization proceedings, *and that it seemed unlikely that petitioner would not have been aware of such fact. We submit that such an assumption is purely speculative of nature, and with petitioner confined in jail, should know-*

edge of the actions of other persons be imputed to him? There is no allegation that the petitioners in the foregoing case were confined in the same prison as petitioner or that he had any means of obtaining information concerning the above case.

It is correct that petitioner had counsel appointed in the Selective Service conspiracy case, but the fact that counsel was appointed in a criminal case as provided by the *Sixth Amendment of the Constitution* is no basis for inference that petitioner had even a remote conception that counsel would have been appointed in the civil proceeding if he had so requested. We cannot stress the point too strongly that when a citizen is arrested, speedily removed from his home and taken to another jurisdiction, held under an excessive bond, he should not be charged with the same duty that one under normal circumstances and conditions should bear.

The fact that Klapprott did not move for a period of approximately four and one-half years in an effort to set aside the default judgment cancelling his certificate of citizenship can most certainly be attributed to the following facts:

His indictment in the case of United States v. Wilbur Keegan et al; Southern District of N. Y.; his removal from the State of New Jersey to New York; confinement in prison, under a bond of $25,000.00, his impoverished financial condition preventing him from making bond; his subsequent conviction and five years sentence imposed in the Selective Service conspiracy case; the affirmation of that conviction by the United States Circuit Court of Appeals for the Second Circuit, Wilbur Keegan et al v. United States, 171 F 2d 248; petitioner's removal to the Federal Correction Institution at Milan, Michigan; his subsequent indictment in the case of United States v. Joseph McWilliams et al, in the District of Columbia; his removal from Michigan to the District of Columbia; a

protracted trial of approximately 8 months as a defendant in the foregoing case; a reversal by this Court of the case of Wilbur Keegan v. United States, 325 U. S. 348; the dismissal of the case of United States v. Joseph McWilliams et al, which was affirmed by the United States Court of Appeals for the District of Columbia, United States v. Joseph McWilliams et al, U. S. Ct. of Appeals for D. C. Case No. 9438, most certainly constitute a turmoil of legal entanglements that should justify a defendant so involved as was this petitioner for not moving more promptly in the civil case involving his citizenship. The Government must concede that one serving a five year sentence, and facing a possible additional ten year sentence was most surely in no state of mind to think normally or be charged with normal actions under such conditions. *Klapprott cannot justifiably be charged with knowledge of the Federal Rules of Civil Procedure or of other legal requirements, particularly while under the strain and stress of protracted trials, and with that contention we feel there is no dispute. In view of the foregoing, can it reasonably be said that the petitioner was justifiably charged with laches? We think not:*

Question two presented in the Government's brief reads as follows:

Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.

In the brief filed by respondent, the question as to whether United States Attorney's Office at Newark, New Jersey had knowledge of Klapprott's removal to New York *appears to be entirely ignored*, and the only inference is they knew or should have known of that proceeding. On pages 2, 4, 7, 17 and 23 of petitioner's brief it is stated that Klapprott had been removed from New Jersey to New York

and held under a bond of Twenty Five Thousand Dollars ($25,000.), and there is nothing contained in respondent's brief to the effect *that the authorities were without such knowledge at the time of application for the default judgment for petitioner's failure to answer the complaint within the prescribed period of time. We submit that if the representatives of the Government had knowledge of existing conditions concerning Klapprott, it was their duty to render every assistance to have him present in the District Court in New Jersey, and the Government and only the Government could have accomplished his appearance at the time default was taken. We accordingly refute and contest the statement in respondent's brief that petitioner deliberately defaulted.*

As to whether petitioner had the right to have counsel appointed for him in a case that the authorities appear to concede to be civil of nature we will not discuss, however, *we state that the circumstances of this particular case should have commanded every effort on the part of the Government to have counsel appointed, and particularly to have called to the attention of the District Court, at the time of seeking a default judgment, the fact that the defendant was incarcerated in New York City, indicted with many others charged with a Selective Service Conspiracy, held under an excessive bond which he could not raise, and as result thereof he was unable to appear in Court,* It is respectfully submitted that if such facts had been made known to the Court, we are confident the entry of a default judgment would have been withheld, and the Court would of its own volition have appointed counsel to represent Klapprott. The fact that petitioner's name was included with those of a great number of other persons in the case of *Citizens Protective League v. Clark*, 155 F 2d 290, cert. denied 329 U. S. 797, is not indicative of any ability on his part at that time to retain counsel to institute a proceeding in the State of New Jersey in an effort to vacate the default judgment heretofore entered against

him. At the time the above case was filed, Klapprott was incarcerated in jail in the District of Columbia, and he and a great number of other persons, in addition the Citizens Protective League, were made parties to that proceeding, and all represented by the same counsel.

Question 3 presented in respondent's brief reads as follows:

Whether a judgment of denaturalization may be entered by default without a hearing.

At the outset we urge that the Nationality Act of 1940 does not specifically provide for judgment by default except possibly under certain circumstances, which do not appear in this case, and that appears to be confirmed by the majority opinion of the court below (R 33).

> "'While the statute concerning denaturalization does not expressly say that a judgment may be taken by default against a person who does not appear, it does provide for substitute service * * *'".

The facts in this case most certainly support the findings of Circuit Judge Stephens in his dissenting opinion (R 40) as follows:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, *in the circumstances of this case*, the case should be set aside"

In Judge Stephens' reference to the circumstances of this case we can only assume he meant the fact that Klapprott had been removed to another jurisdiction prior to the sixty-day period in which to answer the complaint, so that his ability to appear to contest the default judgment was entirely in the hands and discretion of those who sought to cancel his citizenship, and under such circumstances all evidence ex-parte should have been presented by the Government to support the allegations of the complaint. We are entirely in accord with the learned judge

in his dissent, and urge that in all fairness to this petitioner he should have had his day in Court.

In view of the respondent citing the case of *United States v. Borchers 163 F. 2d 347, 348-350, certiorari denied, 332 U. S. 811* in support of the right to take a default judgment without the production of evidence ex parte, we feel constrained to print additional parts of the opinion to show that the case is most certainly not comparable with the facts presented in the instant case.

In the opinion of Circuit Judge Augustus N. Hand it is stated:

> "The present appeals mark the *fourth time* the defendants Borchers and Fentzke and the *fifth time* that Knupfer have attempted to challenge judgments of denaturalization entered against them by default in 1943.
>
> • • • •
>
> "Knupfer, as we have related in a previous decision —United States ex. rel. Knupfer v. Watkins, 2 Cir. 159 F2d 675—*filed an answer, but before trial, withdrew his answer and "demanded" cancellation of his citizenship. Borchers and Fentzke filed no formal answers, but wrote letters to the United States Attorney declaring that they thereby renounced their citizenship, but denying the allegations of the complaint.*
>
> • • • •
>
> "appeals were filed from two of the orders that had been entered denying their motions.
>
> • • • •
>
> "Those appeals were thereupon abandoned by stipulation of the parties and by order of the Eastern District Court dated June 27, 1946".
>
> • • • • •
>
> "We hold that the orders of Judge Abruzzo should be affirmed because: (1) Motions to open and vacate do not lie as a substitute for a DELIBERATELY

ABANDONED APPEAL, (2) THE APPELLANTS IN EFFECT CONSENTED TO THE ENTRY OF THE DECREES AGAINST THEM, (3) the error they relied on of neglect to give them a three-days notice of application for judgment was at most only procedural and *not jurisdictional, and is not shown to have been prejudicial to their rights,* (4) if the proceedings be treated as in the nature of bills of review they are defective in failing to show any *excuse for delay* and to furnish any facts to support charges of fraud.

The specific differences between the Borchers and the Klapprott cases are:

1. *Klapprott never abandoned his appeal.*

2. *Klapprott never consented to the entry of the decree against him.*

3. *Klapprott did not write a letter to the United States Attorney as did Borchers and Fentzke declaring that he thereby renounced his citizenship.*

4. *Klapprott did not demand cancellation of his citizenship as did Knupfer.*

5. *Klapprott's confinement in another jurisdiction was such that he was entitled to a 3 days notice of the application for judgment by default, and the absence of such notice was prejudicial to his rights.*

6. *Klapprott has furnished sufficient excuse for his apparent delay in moving to set aside the default judgment in that his confinement for approximately four and one-half years in midst of a turmoil of litigation has definitely been established and provides a justifiable excuse.*

In view of the foregoing facts it is urged that the circumstances in the Borchers case are so different from those in the Klapprott case, that the opinion of the Second Circuit Court of Appeals so far as it relates to default judgments cannot be applied here.

We submit that the questions presented merit review by this Honorable Court.

CONCLUSION

For the reasons stated in petitioner's original and reply briefs, we sincerely urge that the writ of certiorari should issue.

Respectfully submitted,

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(Emphasis supplied)

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No. 42

BRIEF FOR PETITIONER

IN THE

Supreme Court of the United States

October Term, 1948

AUGUST KLAPPROTT,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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IN THE

Supreme Court of the United States

October Term, 1948

No. 42

AUGUST KLAPPROTT,
Petitioner,

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

The opinion in the United States Circuit Court of Appeals for the Third Circuit (R. 26-34) is reported at 166 F. 2d 273.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered January 12, 1948 (R 26). It affirmed the order of the United States District Court for the District of New Jersey. Petition for a writ of certiorari was filed on April 10, 1948, and granted May 17, 1948. The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Does the Nationality Act provide for a revocation and cancellation of a certificate of citizenship by default?

2. Should petitioner's certificate of citizenship have been cancelled and revoked without the presentation of evidence ex parte?

3. Were petitioner's constitutional rights abridged when, approximately 8 days prior to the prescribed time for answering the civil complaint to cancel his citizenship, he was removed from the State of New Jersey to New York, and held under bond of $25,0000.00, rendering it impossible for him to appear in court in the State of New Jersey at the time the authorities proceeded to take the default judgment for failure to answer the complaint or to appear in the District Court of the United States for the State of New Jersey within the time prescribed.

4. Was petitioner afforded the protection of the due process clause of the Federal Constitution?

5. Should the District Court have appointed counsel to represent petitioner in this proceeding in view of the unusual circumstances?

6. Was petitioner justifiably charged with laches for failing to take steps to reopen his case while confined in jail for approximately 4½ years under one sentence and another criminal indictment?

7. Were the allegations contained in the complaint sufficient to support the charges that petitioner had fraudulently and illegally procured his certificate of citizenship?

STATEMENT OF FACTS

This is an action to set aside and vacate a judgment of the United States District Court for the District of New Jersey, entered July 17, 1942 (R 16), cancelling petitioner's

certificate of citizenship. The complaint was filed by the United States Attorney for the District of New Jersey, and served upon petitioner in the County of Sussex, State of New Jersey, where he was recuperating from a serious illness, following confinement in Christ Hospital, Jersey City, N. J., the seriousness of which illness was such that petitioner at times was in danger of losing his life, and required two blood transfusions (R. 12).

Klapprott was born in Vrochthausen, Germany, September 4, 1906, came to the United States of America in 1927, applied for naturalization November 16, 1933, and was admitted to citizenship in the United States November 16, 1936 (R. 2). He married an American citizen and is the father of one child, who has been with petitioner's wife during his long period of incarceration (R. 15).

Prior to service of the complaint, Klapprott had been an active member of the German-American Bund, and because of that fact, and existing war hysteria, coupled with his poor financial condition, he was unable to obtain counsel to represent him in defense of the charges (R. 12). The prescribed time for filing an answer or other pleading to said complaint was 60 days following date of service, but approximately 8 days prior to the expiration date, petitioner was taken into custody by the Federal Authorities, as result of an indictment which was found against him along with many other persons in the United States District Court for the Southern District of New York, the charge being a conspiracy to violate the Selective Service Act (R 13) *United States vs. Wilbur Keegan et al.* Klapprott was promptly arrested by agents of the Federal Bureau of Investigation, and certain personal belongings were taken from him (R 12), including a letter that he had written and addressed to the American Civil Liberties Union of New York City in which he explained that he was without funds to retain an attorney and re-

quested that they arrange for some legal assistance relating to the citizenship case.

He was held under a bond of $25,000.00, and appeared before the United States Commissioner at Newark, N. J., waiving removal to New York City, N. Y., where he was placed in confinement and held under the same bond as aforesaid, which, because of poverty was unable to raise. The record is silent as to whether or not the removal hearing was attended by a member of the United States Attorney's Office at Newark, N. J.; *however, the indictment of Klapprott and the many others caused such widespread publicity in the newspapers and other mediums that the authorities in Newark, N. J., and particularly those attached to the United States Attorney's Office, most certainly knew, or should have known, of the fact that petitioner had been removed from the jurisdiction of the State of New Jersey to that of New York, and was being held under a bond of $25,000.00.*

On July 17, 1942, the Clerk of the United States District Court, at the request of an Assistant United States Attorney, entered a default judgment against petitioner for failure to answer the complaint within the time prescribed therefor. (R 5)

Klapprott and the many others jointly indicted subsequently were brought to trial in the United States District Court for the Southern District of New York, and after a long and protracted proceeding, was found guilty and sentenced to serve a term of five years. The conviction was appealed to the United States Circuit Court of Appeals, Second Circuit, but in the meantime petitioner remained in custody and in June, 1943, decided to begin service of sentence and was transferred to the Federal Correction Institution at Milan, Michigan, where he remained until January 30, 1944 (R 13). He was then transferred to the District of Columbia, having been indicted jointly with 29 other persons in the case of

United States vs. Joseph McWilliams et al. (R 13), which was referred to as "The Sedition Case", the charge in substance being conspiracy to undermine the morale of the United States Armed Forces. The trial began April, 1944, and while in progress, the United States Circuit Court of Appeals, Second Circuit, on Feb. 29, 1944, affirmed the conviction. *United States vs. Wilbur Keegan et al.*, 141 F. 2d 148. A petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit was filed with this Honorable Court and granted May 15, 1944. On June 11, 1945, this Court reversed the conviction of petitioner and other defendants, *Wilbur Keegan et al. vs. United States*, 325 U. S. 348. As result thereof the 5-year sentence heretofore imposed on Klapprott was set aside.

The "Sedition Case," however, was still in progress, and petitioner remained in jail. After approximately 8 months of continuous trial the case was brought to an abrupt halt by the untimely death of Chief Judge Eicher, a mistrial declared December 7, 1944, but Klapprott was obliged to remain in jail in the District of Columbia until November 22, 1946, when Chief Judge Laws of the United States District Court for the District of Columbia dismissed the indictment. The aforesaid action was appealed by the Government to the United States Court of Appeals for the District of Columbia and the District Court, was affirmed on the 30th day of June, 1947, *United States v. Jos. McWilliams et al.*, 163 F. 2d 695.

For the first time in approximately 4½ years petitioner was removed from all convictions and criminal indictments, and stood a free man, but not for long, because he was immediately apprehended by the immigration authorities and removed to Ellis Island, New York Harbor, N. Y., to await deportation by virtue of his loss of citizenship.

Shortly after removal to Ellis Island, petitioner retained counsel to reopen his citizenship case, and on December 12, 1946, he executed an affidavit (R 15) which was filed in conjunction with other pleadings in the United States District Court for the District of New Jersey in an effort to vacate the default judgment, and permit him his day in court. A hearing was had January 28, 1947, the Government interposing a challenge to the jurisdiction of the Court. No testimony was taken and on February 7, 1947, an opinion was filed by the District Court (R 16) dismissing the proceeding and advancing as a basis therefor Klapprott's alleged laches in bringing the action. On March 17, 1947, an appeal was taken from the Judgment of the District Court to the United States Circuit Court of Appeals for the Third Circuit. On June 11, 1947, the United States Attorney for the State of New Jersey filed a motion to dismiss the appeal because of petitioner's failure to post bond for security of costs, notwithstanding the fact that petitioner was confined on Ellis Island. (R 22-23). He was temporarily released and was able to obtain the necessary costs and the Court entered an order permitting petitioner to file an Appeal Bond out of time, and he then returned to Ellis Island. The case was argued before the United States Circuit Court of Appeals for the Third Circuit October 16, 1947, and decided January 12, 1948. The judgment of the District Court was affirmed by a two to one decision (R 26), Circuit Judge Stephens dissenting (R 34) and stating:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."

A petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit was filed in

the Supreme Court of the United States April 10, 1948, and an order was entered May 17, 1948, allowing certiorari (R 37). During the month of July, 1948 petitioner was released from Ellis Island on parole awaiting the outcome of this case.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Third Circuit erred:

1. In failing and refusing to hold that petitioner's certificate of citizenship should not have been revoked without ex parte evidence being adduced in open court.

2. In failing and refusing to hold that petitioner's constitutional rights were abridged when the Government took a default judgment cancelling his certificate of citizenship in the United States District Court for the Disrict of New Jersey, while the Government had petitioner confined in another jurisdiction.

3. In failing and refusing to hold that there was a manifest duty upon the Federal authorities in New Jersey to advise petitioner that a default judgment was to be taken against him, and to arrange for his transportation from confinement in New York City to the District Court in Newark, N. J.

4. In failing and refusing to hold that petitioner, by the action of the authorities was denied the protection of the due process clause of the Constitution.

5. In failing and refusing to hold that, under the circumstances of this case, counsel should have been appointed to represent petitioner.

6. In failing and refusing to hold that petitioner was not chargeable with laches for failing to take steps to

reopen the case during his period of confinement in jail, during which time he was involved in a turmoil of criminal litigation.

SUMMARY OF ARGUMENT

1. Petitioner's certificate of citizenship should not have been cancelled and revoked by a default judgment without the production on the part of the Government of clear and unequivocal ex parte evidence adduced in open court.

2. Petitioner's constitutional rights were abridged and he was denied the benefit of the due process clause of the Constitution when the Government proceeded to take judgment by default in the United States District Court for the District of New Jersey because of petitioner's alleged failure to answer the complaint within the prescribed time limited therefor, when the authorities knew or should have known that he was being held by the Government and confined to jail in New York City under a bond of $25,000.00, which because of his impoverished financial condition he was unable to raise, all of which rendered it impossible for him to appear in court within the prescribed time to answer the complaint. The court should have been advised at the time of application for a default judgment of petitioner's inability to appear, and the court should have been requested to appoint counsel.

3. Petitioner was not justifiably chargeable with laches for failing to take the necessary steps to reopen his case while confined for a period of 4½ years and the subject of a constant turmoil of criminal litigation.

4. The allegations contained in the Complaint were not sufficient to support the charge that petitioner had fraudulently and illegally procured his certificate of citizenship.

ARGUMENT

1. Petitioner's Certificate of Citizenship Should Not Have Been Cancelled and Revoked by Default Judgment Without the Production of Clear and Unequivocal Ex-parte Evidence.

On May 12, 1942, a Complaint was filed by the United States Attorney for the Northern District of New Jersey, pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A. 738, to revoke the order admitting petitioner to citizenship and to cancel the certificate of naturalization issued thereon on the grounds of fraud and illegality. (R 2)

Title 8 U. S. C. A. 738 (a) reads as follows:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured".

Paragraph (b) of the same section is as follows:

> "The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, *have sixty days personal notice in which to make answer to the petition of the United States;* and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by laws of the State or the place where such suit is brought".

Title 8, U. S. C. A., Section 738 *does not specifically authorize the cancellation of a certificate of naturalization by means of a default judgment.* If such inference can be drawn from the language of the statute, we respectfully urge that evidence ex parte, clear and unequivocal, should be a prerequisite to the granting of such judgment. Reference is made to the dissenting opinion of Circuit Judge Stephens (R 34) on that subject:

> "I dissent. I entertain serious doubt as to the legality of a decree revoking citizenship without proof being adduced in open court. I hold that, in the circumstances of this case, the default should be set aside."

Notwithstanding the fact that Circuit Judge O'Connell concurred in the majority opinion, we make reference to that portion of his separate opinion concerning the taking of a default judgmnet without evidence ex parte:

> "While there can be no doubt that a default judgment may be entered in a proceeding to cancel a certificate of citizenship, I believe that where such judgment is not based upon the presentation of evidence ex parte, every consideration possible should be given to the opening of such judgments, so that citizens may not be lightly deprived of the highest right within the power of the government to bestow."

Reading the complaint in its entirety (R 2) it is not difficult to visualize just how correct and important the foregoing statements of the learned Judges are. We are accordingly quoting certain excerpts from the complaint and affidavit on which the judgment was predicated.

Petitioner became a citizen of the United States November 16, 1933, and the complaint for denaturalization was filed May 12, 1942, approximately eight years and seven months having elapsed. (R 2) Paragraph four (R 2) reads as follows:

"Accordingly, as provided by statute on November 16, 1933, the defendant was administered and took the oath required for naturalization thereupon solemnly declaring before God in open Court that he absolutely and entirely renounced and adjured all allegiance and fidelity to the state or sovereignty of the German Reich; that he would support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same, and that he took the obligation freely and without any mental reservation or purpose of evasion."

Paragraph six charged Klapprott in substance with perjury in that it is claimed he "fraudulently and illegally obtained an order for citizenship", (R 3) and that the certificate of citizenship should be revoked for the following reasons. (R 3)

"At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, *the defendant well knew and realized he was not attached to the principles of the Constitution of the United States,* and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or citizen and, further, that he would not bear true fatih and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic, and further that he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion."

Just what proof did the Government have to charge *"mental reservation"* and *"purpose of evasion"* at the time petitioner took his oath of allegiance to the United States of America on November 16, 1933? The complaint was filed approximately 8 years and 7 months later, all of which should have made the requirement of evidence ex parte more essential in taking a default judgment in his

case. The only facts presented to the court in support of the charges contained in the complaint was the affidavit of W. Rulon Paxman, a Special Agent of the Federal Bureau of Investigation (R. 4-5), and we quote it verbatim:

> Trenton, New Jersey
> May 12, 1942.
> COUNTY OF ESSEX,
> DISTRICT OF NEW JERSEY, ss.
> W. Rulon Paxman, being duly sworn on his oath, deposes and says:
>
> 1. I am a Special Agent of the Federal Bureau of Investigation, U. S. Department of Justice, and I am assigned to duty in the Newark Field Division at Newark in the District of New Jersey and in the course of my official duty I have examined the files of the Federal Bureau of Investigation and in cooperation with the Immigration and Naturalization Service of the Department of Justice, I have received from the offiical files the facts concerning the Naturalization proceedings of the subject August Klapprott.
>
> 2. I have heretofore presented a statement of the facts in this matter to Thorn Lord, Assistant United States Attorney for the District of New Jersey.
>
> 3. I have this day read the annexed copy of the form of complaint entitled United States of America v. August Klapprott, dated May 12, 1942 to which this is attached and the facts stated therein are true to the best of my knowledge and belief and the sources of the said facts are the official records of the files of the Federal Bureau of Investigation and the Immigration and Naturalization Service of the Department of Justice.
>
> 4. I have been officially advised by the said Thorn Lord, Assistant United States Attorney that in the opinion of the United States Attorney the facts presented to him by me and set out in the annexed form of complaint state a good cause for action under the provisions of Section 738 of Title 8, U. S. C. A. for the revocation of the Naturalization of August Klapprott.
>
> W. RULON PAXMAN
> Special Agent
> Federal Bureau of Investigation

Sworn and subscribed to before me at Newark, New Jersey, this 12th day of May, 1942.

STANLEY RUTTCOWSKI
Notary Public of New Jersey

Just what were the facts that Special Agent Paxman found as result of his examination of the files of the Federal Bureau of Investigation and the Immigration and Naturalization Service of the Department of Justice? Were they such facts as would support the charge that August Klapprott had a "mental reservation" and "purpose of evasion" at the time he took his oath of allegiance to the United States of America, some 8 years prior thereto? If so, why were these facts not presented to the District Court in the form of testimony and made part of the record at the time the default judgment was taken?

There is nothing in the foregoing affidavit to the effect that the petitioner was personally investigated by affiant, but the affidavit is predicated solely on information taken from the records compiled by some other person or persons, and is only hearsay. Surely this is not the type of clear and unequivocal proof that should have been required. In the case of *Schneiderman v. United States*, 320 U. S. 118, 87 L ed. 1793, this Court stated, in referring to the question of denaturalization, p. 122:

> "• • • In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on *legal grounds under appropriate proof*. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, whatever may be the rule in a denaturalization pro-

ceeding (see United States v. Manzi, 276 U. S. 463, 467, 72 L. ed. 654, 655, 48 S. Ct. 328), in an action instituted under § 15 for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case. For reasons presently to be stated *this burden must be met with evidence of a clear and convincing character that when citizenship was conferred upon petitioner in 1927 it was not done in accordance with strict legal requirements.*"

In the case of *Baumgartner v. United States*, 322 U. S. 665; 88 L. ed. 1525, Justice Frankfurter speaking for the Court stated, page 1531:

"* * * New relations and new interest flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. * * * That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion * * *."

Unquestionably, the foregoing cases support the statement that denaturalization cases must be approached with the *scrupulous care and regard usually afforded criminal cases.*

There can be no doubt but what the Courts have recognized the criminal aspect of a denaturalization proceeding based on fraud and illegality. In the case of *United States v. Heymig*, 50 F. Supp. 566, P. 567, the Court stated:

"From these excerpts from decisions in other Federal Courts it seems clear to me that the rule not only should be, but is, THAT EVIDENCE OF FRAUD

MUST BE CLEAR AND CONVINCING TO A DEGREE THAT IT SATISFIES THE MIND OF A COURT OF THE TRUTH OF THE CHARGES, *BEYOND A REASONABLE DOUBT*".

In a divorce case, ex-parte evidence is required, and we make particular reference to the Revised Statutes of the State of New Jersey, Vol. 1, Sec. 2.50-27, which in part reads as follows:

> "If the defendant shall not file an answer within the time limited by this chapter or granted by the Court, the Court may make an order that petitioner proceed to take depositions and other evidence and bring on the hearing of the cause ex-parte".

In a debt action, a default is sometimes regarded as an admission of record of the existence of the obligation claimed, and the amount of damages is not always regarded as admitted by default, citing, *Hanover F. Ins. Co. v. Furkas*, 267 Mich. 14, 255 N. W. 381. In the case of *Florida East Coast R. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631, 94 A. L. R. 376, it was held that damages claimed in a punitive damage count of a declaration is not admitted by default. Surely if such actions as divorce require submission of proof as do cases involving unliquidated damages, can it reasonably be argued that a case involving the most sought after possession of man, his American Citizenship, shoud be revoked and cancelled without the requirement of evidence in some manner or form? If there was ever a type of judgment that should be considered void as against public policy, this case represents that example.

In the case of *United States v. Polzin* reported in 48 F. Supp. 476 the Court on page 480 stated in part:

> "However, we have no right to cancel citizenship upon mere speculation. There must be satisfactory proof of fraud or illegality at the time citizenship was granted because, as the statute now reads, it is

only in such instances that citizenship can be taken away."

In *U. S. v. Bergman*, 144 F. 2d 34, the Circuit Court of Appeals in reversing the case held that citizenship once granted should not be revoked *except on positive proof of fraud*, and allowance should be made for any statements made in heat of passion.

We respectfully urge that August Klapprott in his helpless condition, confined in jail in another jurisdiction, under an excessive bail of $25,000.00, was unable to appear and should have been afforded the protection of Rule 55 (b)(2), Rules of Civil Procedure for the District Courts of United States, and that a written notice of the Government's application for default judgment at least 3 days prior to the hearing thereof should have been served upon either Klapprott or his immediate Custodian. Rule 55 (b)(2) reads as follows:

> (2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared herein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

The foregoing rule makes no provision as to notice of default concerning a person confined in jail as was Klapprott, yet all facts considered, and circumstanced as he was, we respectfully urge he should have been afforded the benefit of the rule, and a written notice of at least 3 days prior to the application for a default judgment should have been served on petitioner or his custodian in New York City.

In the opinion of the United States Circuit Court of Appeals for the Third Circuit (R 26) it is stated, with reference to a default judgment (R 28):

> "The question of whether the facts have to be proved in a default denaturalization has been raised in the Second Circuit and passed upon there adversely to the appellant's contention. United States vs. Borchers, 163 F. 2d 347 (C. C. A. 2, 1947), Cert. denied — U. S. — (October 27, 1947). We agree with the Second Circuit."

In view of the foregoing case being cited in support of the position that a default judgment in a denaturalization case may be taken without evidence ex parte, we feel constrained to draw an analogy between the foregoing case and the instant one, which clearly shows the facts in the two cases are most certainly not analogous.

In the opinion of Circuit Judge Augustus N. Hand it is stated, *United States v. Borchers:*

> "The present appeals mark the *fourth time* the defendants Borchers and Fentzke and the *fifth time* that Knupfer have attempted to challenge judgments of denaturalization entered against them by default in 1943.
>
> • • • • •
>
> "Knupfer, as we have related in a previous decision —United States ex. rel. Knupfer v. Watkins, 2 Cir. 159 F2d 675—*filed an answer, but before trial, withdrew his answer and "demanded" cancellation of his citizenship. Borchers and Fentzke filed no formal answers,*

but wrote letters to the United States Attorney declaring that they thereby renounced their citizenship, but denying the allegations of the complaint.

• • • •

"appeals were filed from two of the orders that had been entered denying their motions.

• • • •

"Those appeals were thereupon abandoned by stipulation of the parties and by order of the Eastern District Court dated June 27, 1946".

• • • •

"We hold that the orders of Judge Abruzzo should be affirmed because: (1) Motions to open and vacate do not lie as a substitute for a DELIBERATELY ABANDONED APPEAL, (2) THE APPELLANTS IN EFFECT CONSENTED TO THE ENTRY OF THE DECREES AGAINST THEM, (3) the error they relied on of neglect to give them a three-days notice of application for judgment was at most only procedural and *not jurisdictional, and is not shown to have been prejudicial to their rights,* (4) if the proceedings be treated as in the nature of bills of review they are defective in failing to show any *excuse for delay* and to furnish any facts to support charges of fraud.

The specific differences between the Borchers and the Klapprott cases are:

1. *Klapprott never abandoned his appeal.*
2. *Klapprott never consented to the entry of the decree against him.*
3. *Klapprott did not write a letter to the United States Attorney as did Borchers and Fentzke declaring that he thereby renounced his citizenship.*
4. *Klapprott did not demand cancellation of his citizenship as did Knupfer.*
5. *Klapprott's confinement in another jurisdiction was such that he was entitled to a 3 days notice of the application for judgment by default, and the absence of such notice was prejudicial to his rights.*
6. *Klapprott has furnished sufficient excuse for his*

apparent delay in moving to set aside the default judgment in that his confinement for approximately four and one-half years in midst of a turmoil of litigation has definitely been established and provides a justifiable excuse.

In view of the foregoing facts it is urged that the circumstances in the Borchers case are so different from those in the Klapprott case, that the opinion of the Second Circuit Court of Appeals so far as it relates to default judgments should not be applied here.

Analyzing the complaint and affidavit, it narrows down to the fact that the affiant W. Rulon Paxman reviewed certain records compiled by third persons, then furnished that information to the Assistant United States Attorney who in turn expressed an opinion to affiant that such facts constituted a good cause of action sufficient to revoke petitioner's citizenship. It is our contention that the District Court Judge was the proper person to decide whether such facts were sufficient to revoke and cancel Klapprott's citizenship and we reiterate that these facts, whatever they were, should have been presented in the form of evidence ex parte. Citizenship in the United States is most certainly a possession that should not be taken from a person without the production of evidence of a clear and convincing character to warrant its cancellation end revocation.

2. Petitioner's Constitutional Rights Were Abridged and He Was Denied the Benefit of the Due Process Clause of the Constitution When the Government Proceeded to Take Judgment by Default in the United States District Court for the District of New Jersey Because Petitioner Failed to Answer the Complaint Within the Prescribed Time Limited Therefor, When the Authorities at the Time Knew, or Should Have Known He Was Confined in Jail in Another Jurisdiction, and Held Under a $25,000 Bond.

The complaint was personally served on petitioner May 15, 1942 (R 7), at which time he was recovering from a severe illness and had been previously hosiptalized. (R 7). The time prescribed for answering was 60 days following service, and in the meantime Klapprott exerted every effort to obtain counsel to fight the charges, but was unsuccessful because of war hysteria, the nature of the charges, and his lack of funds (R 14). Approximately 8 days before the prescribed time to answer the complaint had expired, he was arrested along with many other persons, all of whom had been indicted by a Federal Grand Jury in New York City. Petitioner waived removal and was taken to New York City and placed in confinement, his indictment and arrest causing widespread notoriety and publicity. After removal to New York the District Court for the Southern District appointed counsel to represent him in the case of *United States v. Wilbur Keegan et al.*, and Klapprott immediately called to that attorney's attention the matter concerning the complaint to cancel his certificate of citizenship. Counsel assured petitioner that he would look into the case, but he failed to do so and the default judgment was taken (R 13). On pages 2, 4, 7, 17 and 23 of petitioner's brief in support of the petition for a writ of certiorari, statements are made to the effect that *the fact of petitioner's removal to another jurisdiction most certainly was known or should have been known by the authorities, and nowhere contained in the respondent's reply brief is a statement that the authorities in Newark, N. J., were without such knowledge at the time of application for the default judgment* for his failure to answer the complaint within the prescribed period of time. We can only infer that at the time of taking default judgment the United States Attorney's Office at Newark, New Jersey, was aware of petitioner's inability to present himself in the United States District Court for the District of New Jersey.

It is urged, in view of the circumstances in which Klapprott was placed, that the Assistant United States Attorney, prior to filing a motion for default judgment, should have called to the attention of the District Court the fact that petitioner was incarcerated in another jurisdiction, and that it was impossible for him to take the necessary steps to protect his interests. We feel confident, had the facts been made known to the court, *either counsel would have been appointed immediately to represent petitioner, or the authorities would have been directed to provide the ways and means to bring him before the Court.* The record is silent as to any such effort on the part of the Government, whose agents, on the one hand, moved for a default judgment in the State of New Jersey cancelling petitioner's certificate of citizenship and on the other hand, prevented his appearance because of incarceration in the State of New York under a prohibitive bond of $25,000.00. It is difficult for us to conceive that the Government can reasonably urge that petitioner was afforded protection of the due process of law clause, or that his constitutional guarantees were not abridged by virtue of what transpired. Klapprott was entitled to his day in court and a hearing of the case on the merits. *The due process clause of the Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law, and an essential element of due process is AN OPPORTUNITY TO BE HEARD BEFORE REACHING OF A JUDGMENT.* By due process of law is meant "A LAW WHICH HEARS BEFORE IT CONDEMNS; WHICH PROCEEDS UPON INQUIRY AND RENDERS JUDGMENT ONLY AFTER TRIAL". *Dartmouth College v. Woodward*, 4 Wheat, 519, 581 (U. S. 1819). As said in *Galpin v. Page*, 18 Wall, 350, 368 (U. S. 1873):

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, AND

HAS BEEN AFFORDED AN OPPORTUNITY TO BE HEARD. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In the case of *L. B. Wilson, Inc., Appellant, vs. Federal Communications Commission*, United States Court of Appeals for the District of Columbia No. 9434 decided April 12, 1948 the Court in *reversing and remanding the case* stated, P. 7:

"In the construction of a statute its provisions should if possible be given a reasonable meaning. Unreasonable consequences should be avoided. Cf *United States vs. American Trucking Association*, 310 U. S. 534-543. (1940)

It would give an unreasonable meaning to the Commission's Act, in view of the purpose of the Act and of the Commission's duties under it, to construe it as not contemplating a hearing to an outstanding licensee on the question whether the extention of facilities to another station will constitute an indirect modification of his license * * *."

P. 15—"Qui aliquid statuerit parte inaudita altera; æquum licent, dixerit, haud æquum fecerit."

"HE WHO DECIDES ANYTHING, ONE PARTY BEING UNHEARD, THOUGH HE SHOULD DECIDE RIGHT, *DOES WRONG*."
6 Co. 52; 4 Bla. Com. 483" 2 Bouvier's Law Dictionary (3d ed. (Rawle) 1914 2157.

It is conceded that petitioner was properly served with process, but we respectfully urge he was denied due process of law and his constitutional guarantees were abridged when the default judgment was taken.

One can arrive at no other conclusion than it was manifest error on the part of the Government to take a default judgment against Klapprott in view of the extraordinary circumstances and conditions that prevailed, and since

the proceeding was in the nature of a forfeiture, Klapprott should have been afforded the right to at least testify in his own behalf.

3. Petitioner Was Not Justifiably Chargeable With Laches for Failing to Take the Necessary Steps to Reopen His Case While Confined for a Period of 4½ Years and the Subject of a Constant Turmoil of Criminal Litigation.

In the opinion of District Judge Smith, United States District Court for the District of New Jersey, it is stated (R. 19):

> "This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his wilful and inexcusable neglect. The action must, therefore, be dismissed because of the defendant's laches * * *"

In the concurring opinion of Circuit Judge O'Connell (R 34) of the United States Circuit Court of Appeals, Third Circuit, it is stated:

> "* * * There being ample evidence in the record before us to justify the finding of the court below that Klapprott had been guilty of laches, I am constrained to agree with the conclusion that the order of the District Court should be affirmed."

We most respectfully disagree with the opinions of the courts below, holding that petitioner was justifiably charged with laches. It is urged that one who has been in jail, as was Klapprott, for a period of 4½ years, subjected to long, protracted trials by virtue of two criminal indictments, one of which was reversed by this Honorable Court and the other dismissed by the United States District Court for the District of Columbia, and affirmed on appeal, should not be held to normal restrictions and ironclad rules as to any time element in an effort to regain citizenship, *taken by default under very unusual circumstances.* We respectfully contend the instant case, so far as the question of laches is concerned, should be treated

and placed in the same category as the case of *Rene de LaMeer vs. People of the State of Michigan*, Supreme Court Law Ed. Advance Opinions Vol. 90, No. 7, Page 47, which was reversed; also the case of *Tony Merino vs. Joseph E. Regan* reported in Vol. 92, No. 5, Supreme Court Law Ed. Advance Opinions, page 203, in which case the judgment below was vacated and the case remanded. In the Rene De LaMeer case a period of approximately *15 years* had elapsed before the matter was brought to this court and in the Merino case a period of *22 years* elapsed. Both cases were reviewed and the convictions held to have been in violation of those petitioners' constitutional rights. WE URGE THAT THE KLAPPROTT CASE INVOLVED A SIMILAR ABRIDGMENT OF CONSTITUTIONAL RIGHTS IN THE INCEPTION AND A VIOLATION OF THE DUE PROCESS CLAUSE. Can it then be said, that one whose constitutional rights have been abridged is estopped in protesting such abridgement by any time element, be it one year or ten years? We are confident the answer must be in the negative.

The fact that Klapprott did not move for a period of approximately 4½ years in an effort to set aside the default judgment can most certainly be attributed to the following facts:

His indictment in the case of *United States v. Wilbur Keegan et al.*, Southern District of N. Y.; his removal from the State of New Jersey to New York; his confinement in prison, under a bond of $25,000.00; his impoverished financial condition preventing him from making bond; his subsequent conviction and five years sentence imposed in the Selective Service conspiracy case; the affirmation of that conviction by the United States Circuit Court of Appeals for the Second Circuit, *Wilbur Keegan et al. v. United States*, 141 F. 2d 248; petitioner's removal to the Federal Correction Institution at Milan, Michigan; his subsequent indictment in the case of *United States v. Joseph McWill-*

iams et al., in the District of Columbia; his removal from Michigan to the District of Columbia; a protracted trial of approximately 8 months as a defendant in the foregoing case; a reversal by this Court of the case of *Wilbur Keegan v. United States*, 325 U. S. 348; the dismissal of the case of *United States v. Joseph McWilliams et al.*, which was affirmed by the United States Court of Appeals for the District of Columbia, *United States v. Joseph McWilliams et al.*, U. S. Ct. of Appeals for D. C. Case No. 9438, and all of which most certainly constituted a turmoil of legal entanglements that should justify a defendant involved as was this petitioner for not moving more expeditiously in the civil case involving citizenship. It must be conceded that one serving a five year sentence, and facing a possible additional ten year sentence, was in no state of mind to think normally, or be charged with normal actions under such conditions. Klapprott should not be charged with knowledge of the Federal Rules of Civil Procedure or of other legal requirements, particularly while under the strain and stress of protracted trials, and with that contention we feel there is no dispute. In view of the foregoing, can it reasonably be said that the petitioner should have been charged with laches? We think not.

We respectfully urge that the apparent delay on the part of petitioner to set aside the default judgment entered July 17, 1942 (R 5), is most certainly imputable to causes beyond his control, and all circumstances considered, the petition was timely. Laches predicated solely on lapse of time is not a justifiable reason for refusing to set aside the judgment and permitting petitioner his day in Court. *He should be afforded a trial on the merits.* There is no absolute rule as to what is "laches". The right of Klapprott to set aside the judgment, all factors considered, is NOT BARRED BY LACHES BECAUSE OF LAPSE OF TIME ALONE, WHERE THERE HAS BEEN NO PREJUDICE TO THE GOVERNMENT BY THE DE-

LAY, AND WHERE PETITIONER NEVER ACQUIESCED TO THE DEFAULT JUDGMENT. The doctrine of "laches" is not designed to punish a plaintiff, and can be invoked only where to allow a claim would, because of claimants own acts, permit an unwarranted injustice. *McClelland v. Shaw*, 72 P. 2d 225, 23 Cal. App. 2d 107. What unwarranted injustice would the Government suffer if petitioner was permitted his day in Court? If the Government maintains that Klapprott is guilty of the charges set forth in the Complaint, then let clear unequivocal proof of the charges be produced. The question as to whether a claim is barred by "laches" must be determined by circumstances in each case and according to right and justice. What would be laches in one might not constitute such in another. It goes without argument the question of laches is one addressed to the sound discretion of the Court, depending on all facts and circumstances of the particular case, and if such be the rule, we most respectfully urge that the District Court in holding Klapprott chargeable with laches in the instant case abused that discretion. (R 16). The circumstances of this case clearly show that petitioner from date of his arrest, July, 1942 (R 8) up to the time of filing his petition to re-open the case was suffering a legal disability as result of his continued incarceration in an involvement of legal turmoil. In the case of *Garza v. Kennedy, Texas*, 299 S. W. 231, it was held that a person laboring under legal disability is not chargeable with laches for failure to move during disability, but is only required to exercise reasonable diligence in moving to vacate a judgment rendered against him after removal of the disability; "laches" not being mere lapse of time, but being unreasonable delay under circumstances generally involving injustice or injury to the opposite party. The foregoing language fits petitioner's case. With a conviction of in the case of *U. S. v. Wilbur Keegan et al*, 141 F. 2d 148, a five year sentence, and a possible ten year sentence if convicted in the case of *United States v. Joseph*

McWilliams, 163 F. 2d 695, confronting petitioner, can it reasonably be said that he was in a position to obtain assistance from friends or relatives to defend his case? As soon as the barriers of sentence and criminal indictments were lifted, he immediately sought aid and did so promptly, and his actions were such as to at least impute reasonable diligence.

Laches is a substantive defect, although it applies to procedural matters as well. If the District Court's contention was that it had no jurisdiction, then laches was not necessary to the Court's decision. If, however, laches is an important criterion, then the Court's jurisdiction is not affected and the sequitur is that, because of undue delay, the aggrieved party may not prevail. There can be no doubt but what under proper circumsfances, a judgment cancelling citizenship can be vacated and set aside, and time should not act as a barrier in justifiable cases. In the case of *United States v. Geisler*, reported 9 F. R. S., 60 B 51, involving a cancellation of the defendant's certificate of citizenship, a PERIOD OF ALMOST FOUR YEARS ELAPSED BETWEEN THE ENTRY OF A CONSENT JUDGMENT AND THE APPLICATION TO SET IT ASIDE, YET THE DISTRICT COURT SET THE JUDGMENT ASIDE. There are cases too numerous to recite where delay of several years in maintaining actions was not barred by laches.

In the case of *Smith v. Smith*, 10 So. 2d, 664, 665, 243 Ala. 488, it was held that the filing of a bill in nature of a bill of review within three years after rendition of a decree did not constitute "laches." Other cases which have held that an unusual length of time in bringing an action was not a barrier, are *United States v. One Case Chemical Compound*, 203 F 63; *McDowell v. Bauman*, 224 SW 641.

In the case of *Holmberg v. Armbrecht* reported in 327 U. S. page 390, 90 L. ed. 743, Mr. Justice Frankfurter in delivering the opinion of the Court stated,

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'Laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—and inequity founded upon some change in the condition or relations of the property or the party.'"

Citing *Galligher v. Cadwell*, 145 U. S. 368.

In the case of *Keeler Bros. v. Yellowstone Valley National Bank*, 225 Fed. 270 the judge in his opinion stated:

"* * * Speedy determination of litigation, sometimes invoked as sufficient reason to deny the motion, is not the end, but means, to justice; and delays from defaults, generally more apparent than real, should be penalized by terms rather than by judgments, that may be gratuities to plaintiffs, and punishments to defendants, having nothing of the ultimate justice therein. Hence courts ought to and do lean to trials of the merits, and to vacate defaults even when only doubtful whether the inference or presumption is repelled or overcome, or, as generally put, doubtful whether the default should be opened * * *"

Is not this the better view to follow in the administration of justice and particularly in a case involving the most priceless possession of man, his American citizenship? We urge that the record of this case amply supports the conclusion that petitioner having suffered the disability of confinement for four and one-half years, involved in a turmoil of protracted criminal litigation cannot be justifiably charged with laches, and we particularly urge, laches should have been proven before being applied. August Klapprott was not guilty of willful and inexcusable neglect, all circumstances and conditions considered.

If the Government was in error in the inception by taking a default judgment, and petitioner's constitutional rights were abridged and violated by that action, can it then be reasonably argued that charging Klapprott with

laches was the proper approach to correct the original error which was not his. We think the question should be answered in the negative.

4. The Allegations Contained in the Original Complaint Were Not Sufficient to Support the Charge That Petitioner Fraudulently and Illegally Procured His Certificate of Citizenship.

The portion of the District Court's opinion relating to this phase of argument reads as follows (R 19):

> "It is contended by defendant that "the allegations of the complaint, even if considered as admitted, by reason of the (defendant's failure to answer the same, do not meet the requirements of the clear, unequivocal and convincing proof required as a basis of judgment". This contention presupposes that a default judgment may be entered only upon proof of the allegations of the complaint, and with this we cannot agree. *The allegations of the original complaint were sufficient to support the charge that the certificate of naturalization was illegally and fraudulently procured* • • •."

We feel confident that the Government would be constrained to admit, if this cause was to go to trial on the merits, taking into consideration the decisions of the United States Supreme Court, the various Circuit Courts of Appeals, and the District Courts, a decision of necessity would be found for this defendant. An examination of the complaint will reveal that printed forms were prepared, and in which blank spaces were left for purpose of filling in particular facts concerning each defendant, whom the Government might consider subject to an action for cancellation of certificate of citizenship. The complaint was stereotype of nature, and the specific charges against petitioner were typed in spaces so provided.

Paragraph five of the complaint (R 2) is a descriptive example. Here we have charges incorporated in printed forms and the only portion thereof that was *typed in* was the number *"370-7549"* and the date *"November 16, 1933."* (R 2-3) The charges contained in that paragraph are as follows:

> "The oath made by the defendant to the petition, and of renunciation of allegiance to the German Reich, was *false* and, thereby, *he fraudulently and illegally obtained* an order for admission to citizenship, and the certificate of naturalization (No. 370-7549), which was received by the defendant on November 16, 1933, should be revoked and cancelled for the following reasons:
>
> "At the time the defendant took the oath to the petition for naturalization and the oath of allegiance to the United States of America, and renounced his allegiance to the German Reich, the *defendant well knew and realized he was not attached to the principles of the Constitution of the United States and he did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich* of which he was theretofore a subject or citizen and, further, *that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, foreign and domestic,* and further that he *did not take the obligations of the oath freely and without any mental reservation or purpose of evasion.*"

Paragraph Six (R 3) of the complaint in which specific charges have been typed in the space so provided reads as follows:

> "The defendant is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund and its affiliates in and about the District of New Jersey. He has been president of the German-American Bund and Director of Camp Nordland; Vice President of the A. V. Pub-

lishing Company; member of the Board of the A. V. Developments Corporation; head of the Protective Citizens' League, Inc., trustee for the Eastern Department of National Protective Trustees."

A further portion of the allegations typed in the blank spaces so provided in the Complaint (R 3) are:

"From time to time and subsequently to 1935, the defendant has made, both in writing and in speeches, numerous statements indicating his allegiance and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America."

"The principles of the organizations referred to are inimical to the Constitution of the United States and to the good order and happiness of the United States, and in fact were propagated and encouraged by the present enemies of the United States including persons who believe in the ideology enunciated by Adolph Hitler and the present ruling party of the German Reich."

Could it possibly be inferred that the Government could have produced "clear" and "unequivocal" evidence to prove *beyond a reasonable doubt* that appellant fraudulently and illegally obtained an order for admission to citizenship, or that he was not attached to the principles of the Constitution of the United States, or that he did not in fact intend to renounce and abjure absolutely his allegiance and fidelity to the state or sovereignty of the German Reich, or that he would not bear true faith and allegiance to the Constitution of the United States of America against all enemies, or that he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion? We think not, for in the first place, the fact that the above allegations are contained in that portion of the complaint that appears to be a mimeographed form, appear to make the charges applicable to all persons of German birth who had been naturalized and later found themselves subject to a similar proceeding.

There is no denial but what Klapprott was a member of the German-American Bund and an officer of that organization, but that alone would be insufficient to support the charges. Since date of filing the complaint, and with particular reference to petitioner's affiliations with the "Bund" and other "organizations" associated thereto, we respectfully call to the attention of this Honorable Court many decisions that will conclusively support the argument, that mere association, active or otherwise, with the German-American Bund or other closely related organizations, *do not in themselves form a basis for cancellation of a certificate of citizenship.*

The following cases support the foregoing contention:

Schneiderman v. U. S. 320 U. S. 118, 87 L. ed 1796
Baumgartner v. U. S. 322 U. S. 665; 88 L. ed 1525
United States v. Hauck et al, 155 F2nd 141
United States v. Sotzek et al, 144 F2nd 576
United States v. Rossler 144 F 2d 463
United States v. Hartman 51 Fed Sup 394
United States v. Claassen 56 Supp. 71
United States v. Giese 56 F. Supp. 1018
United States v. Haas et al, 51 F. Supp. 910
United States v. Koerner, 56 F. Supp. 242
United States v. Kusche, 56 F. Supp. 237
United States v. Mensing, 56 F. Supp. 253

We have no knowledge as to the nature of the alleged "writings" and "statements" made by Klapprott (R 3) which it is said indicated his loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America, but we can refer to many case *that have been reversed,* where the various defendants have made statements similar to those charged to petitioner, and which the Courts have held did not warrant a cancellation of a certifi ate of citizenship.

Particular attention is called to the denaturalization case of *Meyer v. U. S.* 141 F2d 825, and in which proceeding the

5th Circuit Court reversed the District Court, and specific reference is made to the opinion of Circuit Judge Hutcheson relating to the record as set down by the District Court concerning statements made by Meyer, Page 27.

> "In support of his ultimate conclusion, the District Judge set down that the record showed: (1) that Meyer spoke disparagingly of the American people as contrasted with the German people, (2) that Meyer thought Germany would win the war; that he thought that in any war there was no moral question involved; that history showed that only success had ever counted where war was concerned; (4) that he was pleased over the victories of Germany over Poland, the Netherlands and France; (5) that he was frequently disgusted with America and thought the American people stupid; that he believed American patriotism to be narrow nationalism, and on one occasion said he could never be a real American (6) that he associated on friendly terms with Germans, some holding official places here under the German Government, who were later either interned or required to leave; (7) that once he said it would be a good thing to have a mild form of Fascism in America; (8) that in September, 1939, he wrote an article which said in effect that America was to blame for the war because it had gotten mixed up in the last one, and thereby prevented Germany's winning it; (9) that he thought that Germany would win, and he thought a German victory would be a blessing to the world; (10) that he many times used the words, "our country" and "my country" meaning Germany, and "your country" meaning the United States; (11) that he became an American citizen *only* because it was convenient, and because he could say anything he wanted to and that he would remain in this country only as long as it was to his material advantage * * * "

While there are explanations and statements relating to certain of the above allegations contained in the footnotes on P. 27 of the opinion, we earnestly urge, that had the Government made the alleged "writings" and state-

ments" attributed to Klapprott, a matter of record, they most certainly would not have been of the above character. Reference is made to the case of *United States v. Hauck et al*, 155 F2d, 141 which was also reversed on April 2, 1946. A cursory review of statements made by the defendant Hauck will be enlightening, as will those made by the defendants in *Bergman v. United States*, 144 F2d 35; *Jogwick v. United States*, 142 F2d 998.

Particular attention is called to that portion of the Court's opinion in *Baumgartner v. U. S.* 322 U. S. 665, Page 667:

> "There was testimony that in 1933 or 1934 Mrs. Baumgartner's Mother visited this country, and after this visit, Baumgartner, beginning in 1934" praised the work that Hitler was doing over there in bringing Germany back, on repeated occasions". Evidence of statements made by Baumgartner over a period of about seven years beginning in 1933 indicated off-repeated admiration for the Nazi Government • • • " that regimentation, as the Nazis formed (sic) it was superior to the democracy" and that "the democracy of the United States was a practical farce". • • • There was testimony that Baumgartner justified the German invasions in the late 1930's, and announced when Dunkerque fell, that, "Today I am rejoicing". • • • diary entries reflect violent anti-semitism, impatience of the lack of pro-German militancy of German Americans, and approval of Germans who have not "been Americanized, that is ruined." • • •

The fact that August Klapprott never returned to Germany, even for a visit, as did so many of the defendants in various denaturalization causes, is most certainly a supporting factor in his favor. How can one arrive at the conclusion that the allegations of the original complaint (R 2) were sufficient to support the charge that the certificate of naturalization was illegally and fraudulently procured by August Klapprott, when no factual statements capable of clear, sound and unequivocal proof were made,

nor was there any disclosures as to the nature of his statements contained in the "writings" and "speeches" charged in the complaint (R 3).

We most respectfully submit the allegations of the complaint could not be supported by clear and unequivocal evidence, nor in our opinion could the proof meet the standards set forth by the Supreme Court of the United States in the cases of *Schneiderman v. U. S.*, 320 U. S. 118; 87 L. ed 1796 and *Baumgartner v. U. S.*, 322 U. S. 665; 88 L. ed 1525.

CONCLUSION

In past history it has always been one of our principles that a defendant should have a trial on the merits where a fundamental right is involved. So much has this been ingrained in our law, our way of life, and our everyday approach to civil liberties, that the Courts have taken every precaution to preserve these most precious rights at all times. August Klapprott has a valid and meritorious defense to this action, and could show good faith and excusable neglect if afforded the opportunity. It is respectfully urged that under the circumstances and conditions associated with this case that he is entiled to his day in Court.

We further urge that petitioner has been denied the protection of the due process clause of the Constitution and that his constitutional guarantees have been definitely abridged. The judgment of the United States Circuit Court of Appeals for the Third Circuit should be reversed

and the case remanded to the United States District Court for the District of New Jersey for hearing on the merits.

(All emphasis supplied.)

Respectfully submitted,

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SUPREME COURT, U.S.
SUPREME COURT, U.S.

No. 42

IN THE **42**

Supreme Court of the United States

October Term 1948

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ANSWER TO MOTION TO MODIFY JUDGMENT

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vs.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ANSWER TO MOTION TO MODIFY JUDGMENT

Petitioner respectfully urges this Honorable Court to deny and dismiss respondent's motion to modify the judgment entered herein for the following reasons:

Respondent at this late date should not be permitted to introduce new facts *not a matter of record*. The colloquy, between the District Court, and counsel for respondent and petitioner, is not evidence and not a part of the record, and most certainly cannot be considered at this time in an effort to alter or modify the judgment of this Court. *After an illegal confinement for a period of approximately six years,* Petitioner requests, and, what has been directed by this Court, is, that he have his day in Court and be afforded a hearing on the merits.

After the Petition for an Order to Show Cause (R 7) was filed, along with the affidavit in support thereof (R 11),

respondent elected to attack the pleadings by an *Oral Motion to Dismiss* on jurisdictional grounds, rather than permit petitioner to offer evidence in support of the allegations contained in the petition. Respondent at no time, so far as the record shows, has ever denied the facts alleged in the petition or affidavit, and the District Court, accepting the undenied allegations as true, held that petitioner had been guilty of "laches" (R 19); F. R. D. 450.

> "This action was initiated by the defendant more than four years after the entry of final judgment in the original proceedings. This undue delay is imputable entirely to his willful and inexcusable neglect. The action must, therefore, be dismissed because of the defendant's laches * * * *".

It is clearly demonstrated that respondent proceeded on the theory of demurrer, and elected that form of relief, and once having conceded the truth and validity of the allegations in the petition before the Court, cannot at this time, approximately two years later, after a decision reversing its position, come before the Court and ask for an opportunity to do what should have been done originally, i.e., to have considered the circumstances and conditions which surrounded this petitioner during the four and one-half years imprisonment prior thereto, and have afforded him the opportunity to have proven the allegations in his petition.

There is no final pleading before the Court, thus the case has been correctly remanded to the District Court for a trial on the merits, and accordingly the respondent cannot be heard to say that it has lost anything by the fact it is now required to submit to a full dress trial on the merits. It appears to us that Government counsel should welcome that opportunity. Briefly discussing demurrers we refer to McKelvey on Common Law Pleading, 2d Ed. Page 74:

> "Sec. 102. At common law the judgment upon the demurrer was final, i.e., it disposed of the action. If the demurrer was sustained and the pleading demurred

to held insufficient, there was no opportunity for the defeated party to amend and go on with the action. If, on the contrary, the pleading was held good and the demurrer overruled, the party demurring was deemed to have had his chance in Court, and as he had chosen to rely on some defect in the other's pleading instead of answering the facts set forth, final judgment was given against him. 2. It is customary everywhere at the present time for the Courts to allow an amendment in case a pleading is held to be bad on demurrer.

State of Maine v. Beck, 60 Me. 498; Ames' (Cases on Pleading, 19.)

On Page 94, McKelvey has the following to say:
Chapter 11. Dilatory Pleas. Sec. 127.

"The demurrer, it has been seen, was a method by which the defendant could avoid putting in an answer to the merits of the cause of action alleged against him, and obtain a determination of the suit solely upon the plaintiff's statement of the case. The real facts may or may not have constituted a good cause of action, and the defendant may or may not have had a good defense. These questions were immaterial. If the plaintiff had failed to make his cause of action appear upon the face of his declaration, or had drawn such declaration in an informal manner, the defendant, without going into the question of the real fact of the matter, could, by general or special demurrer, defeat the plaintiff's suit. But it was only for a fault which appeared upon the face of the declaration that the defendant could demur. If there were other mistakes which the plaintiff had made in the bringing of his action; or in his declaration, which did not appear on the face of the declaration, the defendant could not take advantage of them by demurrer".

At Page 95, the author continues:

"Sec. 130: Dilatory pleas may be divided into three general classes, in respect to the effect which they have upon the disposition of the action (1) Pleas to the jurisdiction of the Court * * *

> "Sec. 131 (1). The plea of the jurisdiction of the Court was in substance a statement that the plaintiff had commenced his action in the wrong Court, either because the Court had no jurisdiction of the subject matter of the action or of the parties thereto, and that on that account the defendant ought not to be compelled to plead. A judgment for the defendant upon the plea to the jurisdiction was a virtual ending of the suit, as far as the particular Court in which it was brought was concerned."

It must be conceded that demurrers search the record and go back to the very first pleading. That was done in this case by Mr. Justice Black in his opinion, Page 8, where he states that the Amended Rule 60(b) applies, and this is in point with his statement that the judgment is void. McKelvey further states that a demurrer searches the entire record and starts from the first pleading and the first one which contains an error decides the case irrespective of the party who raises it. Thus at Page 87, Sec. 120 McKelvey writes:

> "There was a peculiarity about the demurrer which made it somewhat dangerous for a party to use unless he was perfectly sure that his own pleadings were properly drawn. This peculiarity was the effect which a demurrer had in opening the whole record so that the Court began with an examination of the declaration and took up successively each pleading with respect to its sufficiency and then gave judgment against the party who had made the first mistake without regard to which one had put in the demurrer.
>
> *Hasselbach* v. *Mount Sinai Hospital*, 173 App. Div. (N. Y.) 89 Piggot's Case 5 Reports, 29a Ames' Cases 22."

In analyzing respondent's motion, it appears that it is based solely on the point that the record was barren of the information which it now seeks to argue, but such argument cannot be sustained because on the Motion to Dismiss the petition, the District Court went beyond the question of jurisdiction when it found *Klapprott guilty of laches* and in part stated (R 19) F. R. D. 450 "The action must, therefore,

be dismissed because of the defendant's laches", so the District Court went into the substantive phase of the case in denying petitioner relief on the grounds of laches.

Let us carry the respondent's contention a step further, and beyond the question of technicalities. On page 10 of the motion it is stated:

> "But this Court's judgment orders the case remanded to the District Court" with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint". This denies the Government of the opportunity to which it is entitled under accepted principles of procedure to challenge the allegation of the petition". * * * * But the facts set forth in the Petition have not been shown to be true; they have merely been alleged."

The Petition and Affidavit were made part of the record in Appellant's Appendix in the United States Court of Appeals for the Third Circuit, and in the Appendix before this Court, (R 7 to 15). Nowhere in the reply briefs, in the United States Court of Appeals for the Third Circuit or to the Petition for Certiorari, or to Petitioner's Brief in the Supreme Court, has respondent seen fit to deny the allegations alleged in the petition and affidavit, and even now it does not deny their verity. We are constrained to set forth excerpts from the petition and affidavit which the Government should concede as a matter of record namely:

1. That petitioner became an American Citizen.

2. That the certificate of citizenship No. 370-7549 was received by him November 16, 1933.

3. That a short time prior to service of the summons to cancel his citizenship, petitioner was a patient in Christ Hospital, Jersey City, New Jersey.

4. That upon release from the hospital he was in poor health and had made arrangements to live at Camp Nordland until such time as his health improved.

5. That he was served with the complaint on May 15, 1942 while living at Camp Nordland.

6. That before time had expired to answer the complaint, petitioner was indicted by a Federal Grand Jury in New York City, in the case of *United States* v. *Wilbur Keegan et al.*

7. That approximately 8 days prior to expiration of time to answer the complaint he was removed to New York City, N. Y. after appearing before the United States Commissioner, Newark, N. J., waiving removal and held under a bond of $25,000.00.

8. That he was confined in jail in New York City at the time the Assistant United States Attorney at Newark, New Jersey, applied for a default judgment cancelling his citizenship.

9. That he was convicted in the case of *U. S.* v. *Keegan et al.*, and sentenced to 5 years; that the conviction was affirmed on appeal, 141 F. 2d 148, and later reversed by the Supreme Court of the United States 325 U. S. 348.

10. That he was indicted in the case of *United States* v. *Joseph McWilliams et al.*, and removed to the District of Columbia; that the case was subsequently dismissed and affirmed on appeal, 163 F. 2d 695.

11. That after all criminal indictments had been removed, he was apprehended and removed to Ellis Island for deportation, after having spent approximately 4½ years in jail by virtue of the two criminal indictments.

12. That he was a party to the case of *Citizens Protective League* v. *Clark*, 155 F. 2d 290, 291; cert. denied 329 U. S. 787.

13. That petitioner was in confinement for approximately six years.

14. That he married his wife, an American citizen, on

Nov. 17, 1936, and that one child was born of said marriage June 12, 1940.

15. That since entry into America, he has never returned to Germany.

It must go without argument that the foregoing allegations comprise the bulk of the petition and affidavit, and which the Government should concede to be correct, in that the facts are for the most, *a matter of record.* The only other phases of the petition and affidavit that would be subject to inquiry and as respondent now seeks are as follows:

16. That at petitioner's request, counsel appointed to defend him in the New York District Court promised to assist him in the New Jersey cancellation proceedings, but apparently failed to do so.

17. That petitioner had written and addressed a letter to the American Civil Liberties Union of New York for legal assistance in connection with his citizenship case and that the letter was taken from him at the time of his arrest by agents of the Federal Bureau of Investigation.

18. That he had been working on a draft of an answer to the complaint at the time of arrest, but was unable to complete the same.

19. That he was in poor financial condition, and was unable to obtain legal assistance due to then existing conditions and war hysteria.

The fact that petitioner could not retain an attorney in the citizenship case nor raise the required bond fee in the criminal case, and the fact the Court had to appoint counsel to defend him in said criminal case is indicative of the fact that petitioner's finances had been depleted, and we again reiterate, it has never been denied that petitioner drafted a letter to the Civil Liberties Union of New York which had been removed from his possession; that he had

attempted to draft an answer to the complaint, or that he had requested assistance from counsel appointed in the criminal case in New York City, to look into his citizenship case, and the record shows that nothing was done with reference to it, but we go further and state, there was no duty whatsoever, upon counsel appointed by the District Court in New York to represent petitioner in any matter other than the criminal proceeding in New York, and which he did. All the allegations enumerated in the petition were contained in the appendix and were fully elaborated on in argument and in the brief, and respondent had prior opportunities to answer petitioner's allegations but failed to do so. Now, after a period of two years, for respondent to raise a doubt at this time as to the verity of the allegations in the petition is most certainly not timely. Petitioner refers to P. 10 of respondent's motion concerning Mr. Justice Burton's concurrence resting "on the special circumstances here shown on behalf of this petitioner" that respondent indicates it would seem to refer to the whole body of facts set forth in the petition and not merely to the formal facts of record and to the undeniable fact of imprisonment. Respondent seems to forget there are other undeniable facts contained in the petition other than imprisonment. Has not the respondent by silence conceded that the authorities had full and complete knowledge of petitioner's removal from New Jersey to New York, his incarceration, and the fact he being held under a bond of $25,000.00 in New York City at the time the default judgment was entered? The foregoing question has been raised time and time again in the petition for certiorari and petitioner's brief, and remains unanswered. On page 11, of petitioner's brief it is stated:

> "We have reason to believe that there *may be additional facts*, which were not in the record and hence could not be mentioned in this Court, *which might have a substantial bearing on the verity of petitioner's allegation purporting to show that he was prevented from contesting the denaturalization complaint.*"

Petitioner respectfully asks, what are the additional facts which *might* have a bearing on the verity of petitioner's allegations? If respondent has in its possession any such facts concerning the verity of petitioner's allegations, why has there been a period of silence for two years? The Court's attention is called to the use of words in the foregoing quote "that there *may* be additional facts * * * * which *might* have a substantial bearing * * * *.

We are at a loss to understand why respondent objects to petitioner having a hearing of the case on the merits. We are confident, in the light of the cases, *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 65, and the dissenting opinion in *Knauer* v. *United States*, 328 U. S. 654 and many other supporting authorities, that after such hearing on the merits, there should be a favorable determination for petitioner.

It is most respectfully urged that the present motion is just one further obstacle presented in an effort to preclude petitioner from a hearing on the merits, and to have that opportunity guaranteed all American citizens, namely, his day in Court, and that is all he asks.

We accordingly submit the Motion should be denied and dismissed, and August Klapprott afforded a trial on the merits in conformity with the opinion of this Honorable Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 732

AUGUST KLAPPROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 32-40) are reported at 166 F. 2d 273. The opinion of the district court (R. 21-25) is reported at 6 F. R. D. 450.

JURISDICTION

The judgment of the circuit court of appeals was entered January 12, 1948 (R. 41). The petition

for a writ of certiorari was filed April 10, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court properly denied petitioner's motion to vacate a judgment of denaturalization entered by default four and one-half years earlier.

2. Whether a defendant who has deliberately defaulted in a denaturalization proceeding is entitled as of right to have counsel appointed for him and to be present in court before a judgment is entered.

3. Whether a judgment of denaturalization may be entered by default without a hearing.

STATUTES AND RULES INVOLVED

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 55(b)-(2) of the Federal Rules of Civil Procedure provides in part:

> * * * If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its recent amendment, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal rep-

resentative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

STATEMENT

In May 1942, the United States commenced proceedings in the United States District Court for the District of New Jersey pursuant to Section 338 of the Naturalization Act to cancel petitioner's certificate of naturalization on the ground that he had taken a false oath of allegiance (R. 2-6). A summons was personally served on petitioner on May 13, 1942 (R. 1). When petitioner failed to make his appearance within the 60-day period fixed by the statute, *supra*, judgment by default was entered against him on July 17, 1942 (R. 7).

Four and a half years later, in January 1947, petitioner moved in the district court to vacate the judgment of denaturalization (R. 9-20). In an affidavit submitted in support of the petition, he alleged that at the time he was served with the summons on May 15, 1942, he was in ill health, and

was recuperating at the German-American Bund camp, known as Camp Nordland, and that because of his poor health and straitened financial circumstances, he was unable to obtain an attorney (R. 15). On July 7, 1942, eight days before the expiration of his time to answer or otherwise move in the denaturalization proceedings, he was arrested under an indictment returned against him and other Bund leaders in the United States District Court for the Southern District of New York charging conspiracy to violate the Selective Service Act. Petitioner alleged that at the time he was arrested, he had in his possession a letter addressed to the American Civil Liberties Union in New York requesting legal assistance, that the letter was taken from him at the time of his arrest, and that he did not know what had become of it. (R. 15-16.) He also alleged that the attorney who was appointed to defend him in the New York conspiracy case promised to look into the denaturalization proceedings, but that the attorney failed to do so (R. 16). He further alleged that from the time of his arrest in July 1942 until November 1946 he was in constant custody under the indictment and conviction on the conspiracy charge (subsequently reversed by this Court, *Keegan* v. *United States*, 325 U. S. 478), and in connection with the sedition trial in the District of Columbia; that after his release on the criminal charges, he was taken into custody for deportation and confined at Ellis Island (R. 16-17). He further stated that in July

1945, he and a number of other persons sought an injunction against possible deportation, but that such relief was denied (R. 17). (See *Citizens Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787.) He asserted that, because of these circumstances, he had been unable to defend the denaturalization proceedings, and he denied the truth of the allegations in the complaint for denaturalization (R. 18-19).

The district court denied the motion (R. 26). In its opinion, the court stated that from petitioner's own affidavit it appeared that his default was imputable to his own wilful and inexcusable neglect, but that even on the contrary assumption, Rule 60(b) of the Federal Rules of Civil Procedure rendered the court without power to open petitioner's default more than six months after entry of the judgment (R. 21-22). Treating the petition as a bill of review, the district court held that petitioner had shown no grounds for such relief, since he could point to no error on the face of the record and no new facts affecting the decree which would warrant its being set aside (R. 22-23). The district court also held that petitioner's delay in seeking relief from the judgment was imputable entirely to his wilful neglect, and that his petition should be dismissed on the ground of laches (R. 24). The court said (R. 24-25):

> * * * It is our opinion that the defendant's initiation of this action at this late date

> was not prompted by any desire to assume the duties of citizenship but by a recent realization of the serious consequences attendant upon the loss of its privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

On appeal, the order of the district court was affirmed (R. 41), one judge relying primarily on the absence of jurisdiction, although also noting the lack of equity in petitioner's application (R. 32-39), one judge relying primarily on laches (R. 39-40), and one judge dissenting (R. 40).

ARGUMENT

1. Despite his present protestations to the contrary, it is clear that petitioner's default in the denaturalization proceedings was wilful and deliberate. By his own account, at the time of his arrest on the New York conspiracy indictment, 52 days after he had been personally served with the summons, and only eight days before his time to answer expired, he had taken no steps whatsoever to secure representation in the denaturalization proceedings. As to the alleged letter which he was preparing to send to the American Civil Liberties Union at the time of his arrest, it is significant that petitioner makes no allegation that he attempted to discover what happened to that letter, or that he attempted to communicate further with that organization.

Furthermore, it is clear that petitioner has offered no valid excuse for failing to move more promptly after the entry of judgment. His incarceration on the criminal charges would not have prevented him from seeking assistance. As a matter of fact, a number of petitioner's co-defendants in the Selective Service conspiracy case were actively defending denaturalization proceedings (see *United States* v. *Kuhn*, 49 F. Supp. 407 (S. D. N. Y.), decided March 18, 1943),[1] and it seems unlikely that petitioner would have been unware of such fact. Admittedly, petitioner had counsel appointed for him in the conspiracy case, and thus knew of the practice of courts to assign counsel for indigent defendants. It is significant that he made no attempt to seek assistance of counsel from the District Court for the District of New Jersey. In addition, as noted in the concurring opinion of Judge O'Connell, petitioner was able to obtain counsel in an attempt to prevent possible deportation in 1945, while held on the sedition indictment, and was able to institute the instant proceedings after certiorari had been denied in that case. His custody was, therefore, not a barrier to obtaining legal assistance as he now asserts it to have been.

Manifestly, therefore, petitioner's default and subsequent inaction were wilful and deliberate.

---

[1] Petitioner states that he began service of his sentence on the Selective Service charge in June 1943 (R. 16).

There is ample justification for the conclusion of the district court and of the majority of the court below that petitioner was guilty of laches. It seems clear that the defeat of Germany, rather than any inability to take prior action, prompted petitioner's present motion.

Assuming, therefore, that the district court had power to vacate the judgment four and a half years after its entry, petitioner's motion was properly denied for the reason that he failed to offer any legitimate excuse for not moving more promptly.[2]

2. Petitioner does not contend that the judgment was tainted by fraud or that new evidence has been discovered. He contends, in effect, that there are errors of law apparent on the face of the record which render the judgment of denaturalization void, and thus subject to be set aside at any time.

(a) He argues (Pet. 10-14, 21-24) that, since this Court has ruled that the evidence to support a judgment of denaturalization must be clear, unequivocal and unconvincing, denaturalization proceedings are so assimilated to criminal prosecutions that, as a matter of constitutional right, a defendant must be before the court when judgment

[2] Cf. Rule 60(b) of the Rules of Civil Procedure as recently amended, 329 U. S. 863, which specifies and codifies the relief available under older forms of remedy and provides that a motion for relief from a final judgment must be made within a reasonable time, and in some specified cases within one year after judgment.

is entered, and counsel must be assigned for him. Denaturalization proceedings are, however, obviously not criminal prosecutions. They are equity actions and it is manifest that Congress treated them as civil actions since it made provision for substituted service on absentee defendants. Certainly the provision for substituted service makes it clear that Congress did not intend to require that a defendant necessarily be before the court before entry of judgment.

While petitioner was not entitled to counsel as a matter of right since the action is a civil one, counsel undoubtedly would have been appointed for him, had he requested the court for such assistance. But since even in a criminal prosecution, a defendant may waive his right to counsel, the court was not required to appoint counsel for a defendant who, by failing to make an appearance or answer of any kind, indicated that he had decided not to contest the allegations of the complaint.

As to petitioner's contention that no clear and convincing evidence could have been adduced by the Government (Pet. 20-21), that, of course, is not an error of law appearing on the face of the record, and not a matter which can be determined at this time. As the Circuit Court of Appeals for the Second Circuit held in *United States* v. *Borchers*, 163 F. 2d 347, 349-350, certiorari denied, 332 U. S. 811:

> * * * As to such judgments the default of defendants who have been personally served

may well take the place of the "clear and unequivocal" evidence required had the case gone to trial. * * *

(b) Petitioner also contends that the court had no power to enter a judgment of denaturalization without hearing evidence (Pet. 19-21). This contention was made and rejected in the circuit court of appeals in the *Borchers* case, *supra*, and was urged in the petition for certiorari to this Court. Under Rule 55(b) of the Federal Rules of Civil Procedure, the necessity for a hearing is a matter within the discretion of the trial court. Testimony is normally taken only in those cases where the extent of the relief to be granted must be determined on evidence, and not from the complaint. Here, of course, the relief sought in the complaint was definite and certain—the cancellation of the certificate of naturalization—and judgment was entered for the specific relief sought by the complaint.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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NO. 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

AUGUST KLAPPROTT, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 42

AUGUST KLAPPROTT, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions in the circuit court of appeals (R. 26-34) are reported at 166 F. 2d 273. The opinion of the district court (R. 16-20) is reported at 6 F. R. D. 450.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 12, 1948 (R. 35). The petition for a writ of certiorari was filed on April

10, 1948, and certiorari was granted on May 17, 1948 (R. 37). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED

Whether after 4½ years petitioner may be entitled to the setting aside of the default judgment of denaturalization taken against him.

1. Because he was taken into custody seven days prior to the expiration of his time to answer and kept in custody thereafter, during which time, although his custody did not prevent him from taking steps to defend himself, he made no effort to do so except to request an attorney to act for him before the default.

2. Because the Government did not introduce clear and convincing evidence to support the default judgment.

3. Because counsel was not appointed to defend petitioner.

4. Because the complaint allegedly did not state a cause of action.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules appear in the Appendix, *infra*, pp. 54-58.

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[1] Effective September 1, 1948, 28 U. S. C. 1254 (1) became the jurisdictional basis for cases of this type. Pub. L. No. 773, 80th Cong., 2d Sess.

STATEMENT

In May 1942, the United States commenced proceedings in the United States District Court for the District of New Jersey, pursuant to Section 338 of the Naturalization Act, to cancel petitioner's certificate of naturalization on the ground that he had taken a false oath of allegiance (R. 2-5).

The complaint alleged, *inter alia*, that defendant "is and has been notoriously and openly one of the chief leaders and active members of the German-American Bund and its affiliates in and about the district of New Jersey," that he had been president of the Bund and an officer of various affiliated organizations, and that since 1935 he had made many "*statements indicating his allegiance* and loyalty to the German Reich and his disregard and disrespect for the principles and institutions of the United States of America" (R. 3). A summons was personally served on petitioner on May 15, 1942 (R. 1). When petitioner failed to make his appearance within the 60-day period fixed by the statute, judgment by default was entered against him on July 17, 1942 (R. 5-6).

Four and a half years later, in January 1947, petitioner moved in the district court to vacate the judgment of denaturalization (R. 7-13). In an affidavit submitted in support of the petition, he alleged that at the time he was served with the summons on May 15, 1942, he was in ill health, and was recuperating at the German-American

Bund camp, known as Camp Nordland, and that because of his poor health and straitened financial circumstances, he was unable to obtain an attorney (R. 12). On July 7, 1942, a week before the expiration of his time to answer or otherwise move in the denaturalization proceedings, he was arrested under an indictment returned against him and other Bund leaders in the United States District Court for the Southern District of New York charging conspiracy to violate the Selective Service Act. Petitioner alleged that at the time he was arrested, he had in his possession a letter addressed to the American Civil Liberties Union in New York requesting legal assistance, that the letter was taken from him at the time of his arrest, and that he did not know what had become of it. (R. 12-13.) "Petitioner had also drawn up a draft of an answer to the complaint and was working on it at the time of his arrest, but because of the fact that he was taken into custody, petitioner was unable to complete it and it was left at petitioner's home when he was taken away" (R. 8). He also alleged that the attorney who was appointed to defend him in the New York conspiracy case promised to look into the denaturalization proceedings, but that the attorney failed to do so (R. 13). He further alleged that from the time of his arrest in July 1942 until November 1946 he was in constant custody under the indictment and conviction on the conspiracy charge (subsequently reversed

by this Court, *Keegan* v. *United States*, 325 U. S. 478), and in connection with the sedition trial in the District of Columbia; that, after his release on the criminal charges, he was taken into custody for deportation and confined at Ellis Island (R. 13-14). He further stated that in July 1945 he and a number of other persons sought an injunction against possible deportation, but that such relief was denied (R. 14). (See *Citizens Protective League* v. *Clark*, 155 F. 2d 290 (App. D. C.), certiorari denied, 329 U. S. 787.)

Petitioner alleged generally that because "he was in custody during all of the time above mentioned, and * * * had no financial means of obtaining proper legal representation, [petitioner] was unable to defend the aforesaid proceeding" (R. 9, 14). It is to be observed, however, that petitioner has not alleged that he was not promptly informed of the entry of the judgment of denaturalization, or that during the 4½ years he made any effort, through the prison officials, by letter to the court or elsewhere, or through the numerous attorneys with whom he was in contact during the course of the three lawsuits to which he was a party, to protest against the judgment or attempt to have it vacated. Nor has he alleged that he was prevented from doing so. He admits that he was still in custody when this suit was commenced (R. 8-9, 13), but alleged no change in his condition which made it any less difficult for him to proceed in 1947 than between 1942 and 1946. The Court will, of course,

take notice, as did the lower courts (R. 19-20, 33), of the change and conditions in Germany between 1942, when Germany was successful on the battle fronts, and 1947, and of the effect which this difference might have had upon petitioner's attitude toward deportation to Germany.

The Government did not answer the petition, but challenged the authority of the court "to grant relief at this time" (R. 17), and the proceeding was treated by the court as a motion to dismiss the petition for failure to state a cause of action. Accordingly, for purposes of the present proceeding, petitioner's allegations of specific fact must be taken as true. Except for this purpose the Government does not admit the truth of the facts averred by petitioner (except those of record), and assumes that the proceeding would be remanded for trial if this Court were of the view that the petition set forth a cause of action.

The district court ordered that the petition to vacate be dismissed (R. 20). In its opinion, the court stated that from petitioner's own affidavit it appeared that his default was imputable to his own wilful and inexcusable neglect, but that even on the contrary assumption, Rule 60(b) of the Federal Rules of Civil Procedure rendered the Court without power to open petitioner's default more than six months after entry of the judgment (R. 17). Treating the petition as a bill of review, the district court held that petitioner had shown no grounds

for such relief, since he could point to no error on the face of the record and no new facts affecting the decree which would warrant its being set aside (R. 17-18). The district court also held that petitioner's delay in seeking relief from the judgment was imputable entirely to his wilful neglect, and that his petition should be dismissed on the ground of laches (R. 19). The court said (R. 19-20):

> * * * It is our opinion that the defendant's initiation of this action at this late date was not prompted by any desire to assume the duties of citizenship but by a recent realization of the serious consequences attendent upon the loss of its privileges. The defendant's motives should not, and do not, influence our ultimate decision, but we have thought it well to examine his tenuous excuses for delay in their light.

On appeal, the order of the district court was affirmed (R. 35), one judge relying primarily on the absence of jurisdiction, although also noting the lack of equity in petitioner's application (R. 26-33), one judge relying primarily on laches (R. 33-34), and one judge dissenting on the ground that the court should have held a hearing before entering judgment (R. 34).

SUMMARY OF ARGUMENT.

I.

Rule 60 (b) (as it read until March 19, 1948) permitted a judgment to be vacated on a showing of mistake, inadvertence, surprise or excusable neglect, if the application was made within six months. It also preserved the rights accorded by the old remedies of *coram nobis*, bill of review and *audita querela*, which, insofar as pertinent here, allowed relief for fundamental error of fact not known to the court and fundamental error of law apparent on the face of the record. It was well established that the use of these remedies was subject to the principle of laches.

II.

We do not doubt that if petitioner had been prevented by imprisonment from answering in time and from promptly moving to vacate the judgment entered by default upon his failure to answer, he would be entitled to relief for fundamental error of fact not known to the court. But it is clear that petitioner's incarceration was not responsible for his inaction. After his arrest but before the time for default he requested an attorney to represent him; the attorney promised to look into the matter but failed to do so. A default resulting from counsel's neglect is of the sort covered by the first part of Rule 60(b), and subject to the six-months' limitation. The taking of such a default does not de-

prive a party of his fundamental rights. And, apart from this limitation, petitioner would be barred by laches by reason of his inaction for 4½ years. He has not alleged that he made any inquiry or protest or took any steps with respect to setting aside the judgment prior to the institution of this proceeding, or that the prison authorities prevented him from doing so. The mere fact that he was in custody did not mean that the courts were barred to him. This Court is familiar with hundreds of cases proving the contrary. Other defendants in denaturalization proceedings were able to defend successfully even though imprisoned both during their entire time to answer and during the remainder of the proceeding. And petitioner's participation in three other lawsuits, in addition to this proceeding, while under detention, in each of which he had counsel, proves that it was not his imprisonment but his lack of interest which was responsible for his failure to take any steps toward setting aside the denaturalization judgment until after Germany had lost the war.

III.

The failure of the trial court to require the Government to submit clear and convincing evidence before rendering a default judgment was not an error of law on the face of the record. A denaturalization suit is a civil action, governed by the civil rules, which permit default judgments generally and specify in what circumstances the

taking of evidence is necessary. There is no such requirement in denaturalization cases. The doctrine that there must be clear and convincing proof in 'contested denaturalization proceedings,' in which the defendant denies the charges, has no application when the defendant defaults. Nor was petitioner entitled to have counsel appointed for him; certainly this is true in the absence of any request and of any showing that his confinement deprived him of an opportunity to obtain counsel. A denaturalization suit is not a criminal proceeding, and the rules as to the appointment of counsel in criminal cases are not applicable. In any event, the remedy for error of law apparent on the record must be exercised during the time for appeal, or, at the very least, with due diligence.

IV.

Petitioner alleges that he was entitled to relief because the complaint does not state a cause of action under the *Baumgartner* decision. If this were true it would not state grounds sufficient for vacating the judgment. Moreover, since petitioner was a Bund leader, the facts alleged are closer to the *Knauer* case than to *Baumgartner*, and are clearly sufficient to state a cause of action for denaturalization under the statute.

V.

The amendment to Rule 60(b) effective March 19, 1948, does not govern this case, since the correctness of the lower courts' decisions must be

tested by the rule in effect when the case was before them. See amended Rule 86. But the amendment would not aid petitioner, since he does not come within its substantive requirements, and also would be barred by the express limitation that motions to set aside judgments must be made within one year for some purposes and within a reasonable time for the other grounds specified.

ARGUMENT

I.

THE PRINCIPLES GOVERNING PROCEEDINGS TO SET ASIDE JUDGMENTS, AND ANALYSIS OF PETITIONER'S CONTENTIONS.

Rule 60 of the Federal Rules of Civil Procedure deals with the circumstances in which a party may obtain relief from a judgment after its entry. Paragraph (a) of the Rule is concerned with clerical errors. Paragraph (b), as it read prior to the amendments effective March 19, 1948, provided as follows:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a

court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

We believe this case is controlled by the Rule as it stood while the case was in the lower courts. See amended Rule 86. We shall show, however, that application of the 1948 amendment would not affect the result in the instant case. See Point V, *infra*, pp. 48-53.

The Rule recognizes two types of cases in which judgments may be vacated. It provides specifically for relief in case of "mistake, inadvertence, surprise, or excusable neglect". But the Rule prescribes a six months' time limit for motions based upon these grounds. It is established by numerous decisions in the lower courts, that the six-month period fixed by the Rule marks the outside limit within which such relief may be granted, and that the provisions of Rule 6(b), *infra*, pp. 54-55 permitting an act to be done after the expiration of a specified period where the failure to act was the result of excusable neglect, can not be utilized to enlarge the time for a motion to open a default under 60(b). *Young* v. *Garrett*, 159 F. 2d 634, 636 (C. C. A. 8); *Oliver* v. *City of Shattuck*, 157 F. 2d 150, 152 (C. C. A. 10); *Wallace* v. *United States*, 142 F. 2d 240, 244 (C. C. A. 2), certiorari denied, 323 U. S.

712; *Nachod* v. *Automatic Signal Corp.*, 32 F. Supp. 588, 590 (D. Conn.); *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475, 476 (D. Del.); *Cavallo* v. *Agwilines*, 2 F. R. D. 526, 527 (S. D. N. Y.); *McGinn* v. *United States*, 2 F. R. D. 562, 564 (D. Mass.); *Cassell* v. *Barnes*, 1 F. R. D. 15 (D. D. C.). Contra: *Schram* v. *O'Connor*, 2 F. R. D. 192 (E. D. Mich.). Cf. *Anderson* v. *Yungkau*, 329 U. S. 482, 486, approving *Wallace* v. *United States*, *supra*. (See amended Rule 6(b), *infra*, p. 55.)

The last sentence of Rule 60(b), before its amendment, provided that the "rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding * * *." It has generally been held that this part of former Rule 60(b) preserved, not only the right to bring an independent action in equity to enjoin enforcement of a judgment, but also the remedies available to set aside a judgment by motion after term time, such as writs of *coram nobis*, *audita querela* and bills of review. *Oliver* v. *City of Shattuck*, 157 F. 2d 150, 152 (C. C. A. 10); *Wallace* v. *United States*, 142 F. 2d 240, 244 (C. C. A. 2), certiorari denied, 323 U. S. 712; *Fraser* v. *Doing*, 130 F. 2d 617, 620 (App. D. C.), see Moore and Rogers, *Federal Relief from Civil Judgments*, 55 Yale L. J. 623, 633 (1946). To present a case for relief under this portion of the Rule, petitioner must allege facts which, before the Rules were adopted, would have supported an application to vacate after the expiration of the term.

These older forms of relief were overlapping in scope; several of them allowed relief for the same basic deficiencies, such as fraud or lack of jurisdiction. In brief, it can be said that the writ of *audita querela* afforded relief for matters of fact occurring before or after the rendition of the judgment (Moore and Rogers, *supra*, pp. 659-669 (1946)). The writ of *coram nobis* was available to bring before the court errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the proceeding. See Moore and Rogers, *supra*, pp. 669-674; *United States* v. *Mayer*, 235 U. S. 55, 68. A bill of review in equity is allowed to correct an error of law apparent on the face of the record, because of newly discovered evidence or new facts occurring after the decree is entered, and for fraud. Moore and Rogers, *supra*, pp. 675-682. So far as applicable here, the relief available under the older remedies may safely be summarized as affording a means, after term time, for the vacation of a judgment for fundamental errors of fact not in issue in the original proceeding or for fundamental errors of law apparent on the face of the record.

These writs and forms of action were subject to no definite time limits. But parties invoking them were bound to act within a reasonable time in the circumstances of the case,—that is, in accordance with the doctrine of laches. This is not only confirmed by the cases and secondary authorities, but

by the restatement of the substance of the old actions in the amended Rule 60(b), which requires that motions be made "within a reasonable time" in cases not governed by the definite limitation of one year. See pp. 49, 52-53, 57, *infra*.

Moore and Rogers' authoritative and exhaustive study of Rule 60(b) and the older remedies underlying it declares repeatedly that with respect to time they were governed by the principle of laches. Moore and Rogers, *supra*, pp. 636n, 664, 668, 674, 677, 679, 686. Many decisions so hold with respect to bills of review based upon newly discovered matter or fraud and *coram nobis;* a smaller number of cases indicate that the same is true as to the more rarely used writ of *audita querela*. Bills of review for error of law apparent on the face of the record were required to be filed within the time for appeal.[1] See page 44, *infra*. Bill of review for newly discovered matter: Moore and Rogers, pp. 677, 679; *Brown* v. *County of Buena Vista*, 95 U. S. 157; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, 512; *Hagerott* v. *Adams*, 61 F. 2d 35, 36 (C. C. A. 8), certiorari denied, 288 U. S. 599; *Zegura* v. *United States*, 104 F. 2d 34 (C. C. A. 5), certiorari denied,

[1] "If the bill of review is based upon errors appearing upon the record, it must be filed within the time in which an appeal could have been taken. If, however, the bill of review is based upon fraud in obtaining the decree, or for newly discovered evidence, the time within which it should be filed is governed by the general equitable rules of laches." *Taylor* v. *Easton*, 180 Fed. 363, 368 (C. C. A. 8); *Hagerott* v. *Adams*, 61 F. 2d 35, 37 (C. C. A. 8), certiorari denied, 288 U. S. 599; *McGinn* v. *United States*, 2 F. R. D. 562, 564 (D. Mass.).

308 U. S. 586; *Price* v. *National Surety Corp.*, 127 F. 2d 726 (C. C. A. 6), certiorari denied, 316 U. S. 683; *Ex Parte Thomas*, 114 F. 2d 847 (App. D. C.); 3 Moore, *Federal Practice*, 3263-3264; Dobie, *Federal Procedure* (1928) 763-764; Simkins, *Federal Practice* (3rd ed. 1938) § 720; 8 *Cyc. Fed. Proc. Sec.* 3609; 34 C. J. 409; *Coram vobis:* Moore and Rogers, pp. 636n, 674; *Bronson* v. *Schulten*, 104 U. S. 410; *Spaulding* v. *United States*, 155 F. 2d 919 (C. C. A. 6); *United States* v. *Mahoney*, 43 F. Supp. 943, 945 (W. D. La.); *United States* v. *Wright*, 56 F. Supp. 489, 492 (E. D. Ill.); *Irwin* v. *State*, 220 Ind. 228, 240-248 (1942); *People* v. *Lambley*, 8 Cal. 2d 752, 761 (1937); *People* v. *Vernon*, 9 Cal. App. 2d 138, 142-143 (1935); *People* v. *Harincar*, 49 Cal. App. 2d 594, 596 (1942); *People* v. *Kelly*, 35 Cal. App. (2d) 571, 575 (1939); *Milam County* v. *Robertson*, 47 Tex. 222, 239-240 (1877). *Audita querela:* Moore and Rogers, pp. 664, 668; *Humphreys* v. *Leggett*, 9 How. 297, 313; cf. *Avery* v. *United States*, 12 Wall. 304, 307.

This brief summary demonstrates that judgments may be vacated on grounds of mistake, inadvertence, surprise or excusable neglect if the application is made within six months. They may be vacated for error of law apparent on the face of the record, or for fundamental error of fact not known to the court, when the party is not at fault, so long as the application is not unduly delayed.

We shall now apply these principles to the issues raised by this case.

Petitioner alleges (1) that a default judgment in a denaturalization case cannot lawfully be entered without the introduction of clear and unequivocal evidence, (2) that his constitutional rights were abridged because the Government took a default while keeping him in custody, and (3) that the complaint does not state sufficient facts to constitute a cause of action.

The first contention can be said to allege an error of law apparent on the face of the record, since it appears from the record that the default judgment was taken as a result of petitioner's failure to answer and without the introduction of evidence. The second contention would appear to rest on the fact of imprisonment, a fact outside of the record and unknown to the court at the time of the entry of the judgment. These two contentions, if substantiated, would be of the types for which *coram nobis* or a bill of review might have afforded remedies. The third contention, as to the sufficiency of the facts alleged in the complaint, is clearly not the kind of charge for which a remedy after judgment is available.

We shall demonstrate in the following Points that none of these contentions has merit, and that, as to each of them, the petitioner is barred by his failure over a long period of years to question the validity of the judgment against him.

II.

THE IMPRISONMENT OF PETITIONER DID NOT DEPRIVE HIM OF AN OPPORTUNITY TO DEFEND.

As a whole, petitioner's application in the district court, and the contentions he makes in his brief in this Court, attempt to present the picture of a defendant who has been forcibly prevented by the opposing party, in this case the Government, from having an adequate opportunity to defend. In effect, he is arguing that his arrest on another charge before his time to answer had expired, and his subsequent custody, made it impossible for him to present his defense on the merits.

Were that an accurate picture, we have no doubt that a court would not find itself powerless to grant relief under one or another of the older remedies. Such facts would most closely approximate a case for relief under a writ of error *coram nobis;* they would be "errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself"; errors "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer*, 235 U. S. 55, 68, 69; see *Sanders* v. *State*, 85 Ind. 318, where a plea of guilty was set aside on a writ of error *coram nobis*

on the ground that it had been induced by mob violence. See also Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 Virginia Law Rev. 423. Thus we do not dispute the power of a federal court to set aside a judgment on a showing of truly basic injustice, such as that a defendant, for reasons beyond his control, has been forcibly prevented by the opposing party from having an adequate opportunity to defend.[2]

We think it clear, however, that petitioner has made no such showing. We have in this case only petitioner's own statements as to his reasons for failing to answer and for failing to take action to be relieved from the judgment over a four-and-one-half year period. Taking those statements at their face value, the district court and the majority of the court below found that petitioner had failed to make out a case even of excusable neglect, much less of fundamental injustice. That conclusion, we submit, is amply justified by the record.

The essence of petitioner's argument is (1) that by having him arrested seven days before the expiration of his time to appear and answer the Gov-

[2] On the assumption that imprisonment deprived petitioner of his opportunity to defend, he would be acting within a reasonable time if he did not delay unduly in instituting proceedings after his release from custody.

ernment prevented him from answering, and (2) that he was unable to bring the matter to the court's attention more promptly because he was in custody continuously thereafter.

By petitioner's own account, at the time of his arrest on the New York conspiracy indictment, 53 days after he had been personally served with the summons and a week before the time for his answer would expire, he had taken no steps whatever to secure representation in the denaturalization proceedings. He now alleges that at the time of his arrest he had prepared a letter to send to the Civil Liberties Union, but he makes no allegation that he attempted to discover what happened to that letter or that he attempted to communicate further with that organization. He also alleges that at the time of his arrest he was drawing up a draft of answer to the complaint which he was unable to complete because he was taken into custody. But again he is significantly silent as to any inquiries on his part as to the disposition of this alleged draft or as to any complaint on his part concerning his inability to file an answer. He does not aver that the Government refused to obtain these documents for him at his request, or that he made any request.

Of greater importance is his allegation that in the conspiracy case in New York, "Since petitioner had no funds with which to retain an attorney, the court appointed an attorney, by the name

of McDonald, to defend him and at that time petitioner brought the question of the denaturalization proceedings to his attention. This attorney promised to look into the matter, but petitioner later found out that instead of doing so, he neglected the matter entirely and permitted the judgment to be entered against petitioner by default, after having, by his promises, lulled petitioner into a sense of security with respect to this matter" (R. 8). On its face this shows that his imprisonment did not cause his default, or prevent him from obtaining an attorney. The default resulted from the alleged failure of the attorney who agreed to look into the matter to do so. The default caused by the negligence of one's attorney does not deprive one of his constitutional rights, particularly since it is remediable by a timely application for relief; it cannot be attributed to the Government. So far as appears, petitioner had been in contact with no attorney during the entire preceding period prior to meeting Mr. McDonald.

The judgment in this case thus resulted from the common type of default caused by counsel's neglect. See 34 C. J. 307-316; 49 C. J. S. 506; 114 A. L. R. 279; *Miller Rubber Company* v. *Massey*, 36 F. 2d 466 (C. C. A. 7), certiorari denied, 281 U. S. 749. The provision in Rule 60(b) allowing relief from judgments entered as a result of "inadvertence" or "excusable neglect" would seem to have been meant to deal with defaults of this

sort.[3] As we have seen, motions to be relieved from such judgments must be made within six months—certainly a reasonable time for a defendant truly concerned as to a judgment on such an important matter as his citizenship.[4] Petitioner did not comply with this reasonable requirement.

In *Wallace* v. *United States*, 142 F. 2d 240 (C. C. A. 2) certiorari denied, 323 U. S. 712, plaintiff's counsel did not appear when the case was called for trial and the suit was accordingly dismissed for want of prosecution. More than two years later the plaintiff moved to vacate the judgment. The court of appeals held that the trial court lacked jurisdiction to grant the motion because not made within six months; the case was obviously regarded as one which might have come within the category of "excusable neglect" if the motion had been filed in time. The court of appeals recognized that Rule 60(b) preserved the remedies previously available under the old writs and

[3] See in addition to the cases cited immediately following in the text, *La Barbera* v. *Grubard*, 112 F. 2d 738 (C. C. A. 2); *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb.); *United States* v. *Mutual Construction Corp.*, 7 Fed. Rules Serv. 60b.24 (E. D. Pa.); *Standard Grate Bar Co.* v. *Defense Plant Corp.*, 3 F. R. D. 371 (M. D. Pa.); *Startzman* v. *Los Banos Cotton Gins*, 82 Cal. App. 624 (1927); *Starkweather* v. *Mining Co.*, 5 Cal. App. 2d 501 (1935); *Detroit Fidelity and Surety Co.* v. *Foster*, 170 S. C. 121 (1933); *Ham* v. *Person*, 173 N. C. 72 (1917); *Taylor* v. *Pope*, 106 N. C. 267 (1890); 3 Moore, *Federal Practice*, 3280-3281 and cases cited.

[4] Petitioner does not allege that he was not promptly informed of the entry of the judgment.

the bill of review. But the court stated (142 F. 2d at 244),

> * * * Obviously it cannot have been intended that what may be done within six months, pursuant to the body of Rule 60(b), may also be done thereafter, under the exception contained in its last sentence.

Other cases holding the six-months' limitation applicable to judgments rendered as the result of neglect of counsel are *Reed* v. *South Atlantic S.S. Co.*, 2 F.R.D. 475 (D. Del.); *Sharlot* v. *Ford Motor Co.*, 9 Fed. Rules Serv. 60b.31 (E.D.N.Y.); *Ogniewski* v. *New York Central R.R.*, 9 Fed. Rules Serv. 60b.31 (W.D.N.Y.); *Weller* v. *Socony Vacuum Oil Co.*, 2 F. R. D. 158 (S.D.N.Y.). Since petitioner did not make his motion to vacate for long after six months it is thus plainly out of time.

Even if it be assumed that the older forms of remedies might be available to petitioner for this form of neglect,[5] petitioner is not entitled to relief.

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[5] The cases distinguish between inadvertent or negligent default by counsel and unauthorized stipulating away of a client's case in the course of representation. The former was governed by the first two sentences of original Rule 60(b). *Wallace* v. *United States*, 142 F. 2d 240, certiorari denied, 323 U. S. 712; *Sharlot* v. *Ford Motor Company*, 9 Fed. Rules Serv. 60b.31 (E. D. N. Y.); *Reed* v. *South Atlantic S. S. Co.*, 2 F. R. D. 475 (D. Del.); *Ledwith* v. *Storkan*, 2 F. R. D. 539 (D. Neb.). The latter has been held to justify relief such as is granted in *coram nobis* without definite time limit. *United States* v. *Beebe*, 180 U. S. 343; *Preveden* v. *Hahn*, 36 F. Supp. 952 (S. D. N. Y.); *Cavallo* v. *Agwilines*, 2 F. R. D. 526 (S. D. N. Y.); *McGihn* v. *United States*, 2 F. R. D. 562 (D. Mass.).

For he still must show that he acted diligently, as a reasonable man in like circumstances would have acted.

What would the ordinary man have done when he discovered that a default judgment had been entered against him by reason of his attorney's neglect in a case of any significance? He would immediately protest, to any official he could reach—the court, another lawyer, or, if he was in custody, the prison authorities. If he could not see such persons he would write them. He would not wait 4½ years—if he were really interested in having the judgment set aside. He would almost certainly not even wait 4½ weeks before making some effort to protect his interest.

But the petitioner has not alleged that he took any steps at all prior to 1947. He does not aver that he complained to any prison official, wrote to the court or to any attorney, or in any other manner sought relief from the judgment.[6] His admitted affiliation with the German-American Bund (R. 12, 15), of which he was at one time president

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[6] Cf *Irwin* v. *State*, 220 Ind. 228, 244, in which the court stated:

> "It does not appear that they asked to be taken back into court or that they made any effort whatever to advise the trial court, or the prosecuting attorney, or their families, or friends that they had not intended to plead guilty to kidnaping, and that they did not know when put upon their plea that they were charged with kidnaping, nor is there evidence of facts which would tend to explain or excuse their failure to act for more than four years."

(R. 3), and the German victories of 1942 suggest a reason for his lack of concern for his American citizenship at that time and for the subsequent period prior to the threat of deportation. The court below wisely observed that (R. 33):

> It is quite evident that his citizenship becomes more valuable now that the war has been concluded. Germany has lost and the possibility of deportation is not a gratifying prospect.

Petitioner's alleged reason for his complete inaction is that he was in custody during the period when action could normally have been anticipated. Perhaps in ancient times custody was a barrier to ability to defend; it is not a barrier now. This Court is well aware that incarceration in a federal institution does not prevent a prisoner from writing letters or seeking legal assistance. As the Supreme Court of Indiana stated in *Irwin* v. *State*, 220 Ind. 228, 244: "It is commonly known that prisoners in the state prison have the privilege of writing letters and communicating with their families and friends and with courts and public agencies, and that they have the privilege of receiving visitors on stated occasions." Judicial records show that between 1937 and 1947 1,912 petitions for habeas corpus were filed by prisoners in three federal penitentiaries alone.[7] The Court of Ap-

[7] These statistics are compiled and set forth in the brief for the respondent in *Price* v. *Johnston*, October Term 1947, No. 111, pp. 64-65.

peals for the District of Columbia has noted that between July, 1941, and October, 1944, 635 petitions for habeas corpus were filed in the District court. *Dorsey* v. *Gill*, 148 F. 2d 857, 862-863, certiorari denied, 325 U. S. 890.

The regulations of the Bureau of Prisons allow prisoners to write letters, and make provision for the employment of attorneys by prisoners.[8] Although there is no rule expressly defining the rights of prisoners with respect to counsel, the Director of the Bureau of Prisons has advised the Solicitor General that:

> It has been the policy and the practice of the Bureau of Prisons and of all federal institutions at least since the establishment of the Bureau of Prisons in 1930 to permit every inmate access to an attorney of his own choice. Whether awaiting trial or serving a sentence an inmate may employ counsel to advise or defend him. He need only make his request known to the Warden or Parole Office of the institution to be granted permission to write an attorney seeking his services. Once an attorney is employed, he is permitted to correspond with and visit the inmate as the circumstances of the case may require.

The practice in the District of Columbia jail, in which petitioner was held for some months, is the same.

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[8] U. S. Bureau of Prisons, MANUAL OF POLICIES AND PROCEDURES, 1942, Ch. X, pp. 117, 131, Regulations 1 to 10 and 31.

Persons held in custody by reason of the conspiracy charges involved in the New York proceeding against petitioner were no more disabled from protecting their interests than other prisoners. Eight of petitioner's co-defendants in the New York case filed answers in denaturalization proceedings brought against them while they were in custody, although they were detained during the entire 60 days available for answering the denaturalization complaint, and indeed during the entire course of the subsequent proceeding.[9] Of these eight defendants, two (Weiss and Bregler) ultimately prevailed on appeal (*United States* v. *Hauck*, 155 F. 2d 141 (C. C. A. 2)); a third (Streuer) was denaturalized after trial (*United States* v. *Baecker*, 55 F. Supp. 403, 435 (E. D. Mich.)), but subsequently had the judgment vacated for reasons not pertinent here (*United States* v. *Streuer* (E. D. Mich.), Civil No. 3656); the cases of three others (Ottersbach, Bachmann and Belohlavek) were ultimately dismissed by the Government (*United States* v. *Ottersbach* (N. D. W. D.

[9] The records of the denaturalization cases appear in the files of the district courts and reported decisions, as well as in the files of the Department of Justice. They show when complaints were served, answers filed and judgments entered, and the disposition of the cases. The period of the defendants' detention in connection with the New York conspiracy case appears from the court records in the New York proceeding and the records of the Bureau of Prisons; these show that they were all in custody from the time of their arrest until the reversal of their conviction in *Keegan* v. *United States*, 325 U. S. 478, in June 1945.

Wash.), Cause No. 672; *United States* v. *Bachmann* (N. D. N. Y.), Civil No. 1178; *United States* v. *Belohlavek*, (N. D. Ohio E. D.), Civil Action No. 21519). Willumeit withdrew his answer and consented to judgment (*United States* v. *Willumeit* (N. D. Ill.), Civil Action 4713). Kunz was denaturalized after a trial (*United States* v. *Kuhn*, 49 F. Supp. 407, 416), and did not appeal; his subsequent motion to vacate the judgment was denied. See *United States* v. *Kunz*, 163 F. 2d 344 (C. C. A. 2), in which the Court held that the applicant's imprisonment would not have prevented an appeal from the original adverse judgment.

Petitioner has not averred that he made any effort to avail himself of the procedures available to prisoners generally, or of the methods which prisoners have commonly used to get into court. He argues (Brief 24-25) that his "entanglement" in other legal proceedings justified him in not moving more expeditiously. But these other proceedings prove that petitioner was not held incommunicado —as his repeated references to custody seem to imply. They show that he had more, rather than less, opportunity than other prisoners to obtain legal advice and representation.

While petitioner was in custody he was party to three law suits prior to this proceeding. In 1942 he was tried in New York on the conspiracy charge which came before this Court in *Keegan* v. *United*

States, 325 U. S. 478. At that time the district court appointed Mr. McDonald to represent him (R. 8). Despite petitioner's present allegations as to Mr. McDonald's failure to represent him in the denaturalization case, the record of the trial in New York shows that Mr. McDonald continued to represent him there. The New York trial lasted one month, from September 17 to October 19, 1942. See 325 U. S. at 480. On each trial day petitioner was doubtless in the courtroom, with his own counsel and with at least eleven lawyers representing the other defendants with whom the prisoner could have talked.[10] He was represented by counsel on appeal to the circuit court of appeals and in this Court. In 1944 petitioner was a defendant in the so-called sedition trial in the District of Columbia. He was represented by counsel, and sat in the courtroom for about eight months (R. 9), along with over twenty lawyers representing the various defendants. *United States* v. *McWilliams*, 54 F. Supp. 791 (D. D. C.). In those suits petitioner was a defendant. But in 1945 petitioner was plaintiff in a suit against the Attorney General to enjoin his deportation (R. 9). He was represented by counsel in the district court, the Court of Appeals and this Court. See *Citizens Protective League* v. *Clark*,

[10] The number of attorneys appearing for the various defendants is shown by the trial record in the Southern District of New York. Eight lawyers appeared for the defendants on appeal to the Circuit Court of Appeals. *United States* v. *Keegan*, 141 F. 2d 248 (C. C. A. 2).

155 F. 2d. 290 (App. D. C.) certiorari denied, 329 U. S. 787.

These three proceedings show that not only prisoners generally, but petitioner in particular, have not been disabled by imprisonment from being represented in court. And the instant case affords further proof, if that is necessary. For petitioner was still in custody when this proceeding was commenced. He has not alleged that his early confinement was more strict, or that greater obstacles to the securing of counsel were placed in his way at the earlier stages than now.

All of these facts confirm our contention that not his imprisonment but his inaction was responsible for petitioner's not moving to set aside the judgment of denaturalization for 4½ years. And the factor which moved him to action was not any lessening of the bonds of his custody. His custody, therefore, is not a valid excuse for the delay. It is merely a circumstance seized upon in an attempt to give plausibility to an argument motivated by his only recently acquired preference for residence in the United States rather than Germany. When one recalls the difference between the status of Germany in July 1942 and January 1947, it is not difficult to infer the reason for the petitioner's new interest in American citizenship. As the Court of Appeals for the Second Circuit noted in *United States* v. *Kunz*, 163 F. 2d 344, 346:

> The fact probably is that neither he nor his Bund associates set much value on American citizenship until the war was over, Germany ceased to be a good place to live in, and they were held for deportation.

We submit that a proper analysis of the allegations shows that petitioner's default was due to the neglect of the counsel he requested to represent him before the default, and that his failure to seek relief for 4½ years was due to his own lack of interest, not to any disability. The case thus does not present any deprivation of fundamental rights for which the older forms of relief were available.

Moreover, since his imprisonment is not a legitimate excuse, it is clear that petitioner did not exercise due diligence in moving to set aside the judgment, as both lower courts held.

A number of the cases cited on page 16, *supra*, to show that the doctrine of laches is applicable to *coram nobis* proceedings were criminal cases in which the moving party was in prison. In *People* v. *Vernon*, 9 Cal. App. 2d 138 (1935), a prisoner waiting 4½ years was held barred from relief by reason of his delay. In *People* v. *Harincar*, 49 Cal. App. 2d 594 (1942), five years was held too long a time. In *Irwin* v. *State*, 220 Ind. 228 (1942), the Supreme Court of Indiana held an application in the nature of *coram nobis* unduly delayed four years after defendants had commenced to serve their sentence. The reasons for the requirement of dili-

gence in such cases are well expressed by the Indiana court, and are extremely pertinent here (pp. 241-242, 245-246):

> * * * after judgment, especially upon a plea of guilty, it [the State] has a right to assume that the transaction is closed and settled, and to rely upon finality of the judgment. There is no apparent reason for longer preserving evidence and keeping contact with witnesses. Law enforcement and judicial officers change, and the State is put to a disadvantage if an unexpected trial should be made necessary. These considerations should not in justice cause a disadvantage to the judgment defendant until he has knowledge of the facts and a reasonable opportunity to seek relief, but if he should thereafter willfully delay the assertion of his rights to the further disadvantage of the State, and to his own advantage, the result may often be not the granting of a trial to the defendant, but the practical denial of an opportunity for the State to prosecute its action.
>
> * * * "When time had removed or so scattered the witnesses of the prosecution, or the memory of those who could be obtained had grown dim, a writ of *coram nobis* would result in certain acquittal."
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> * * * * * * * *
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> All limitation upon the assertion of rights or the granting of remedies is based upon sound public policy, the reasons for which need no elaboration, and the reasons apply to and are the basis for the court-made requirement of diligence in seeking relief against

> final judgments as well as the arbitrary statutory limitation upon the bringing of actions, both civil and criminal. These limitations operate upon just and unjust claims alike. It has been thought necessary to deny the right to the assertion of even just claims in order that there may be finality and repose. * * * The judicial limitation involved in the requirement of diligence is more liberal and takes into consideration the condition of the party and the surrounding circumstances, and leaves the determination of the question of whether diligence has been established to the sound discretion of the trial court.

Petitioner argues that the doctrine of laches requires some prejudice to the opposing party due to the delay. But as the Indiana court recognized in the statement just quoted, the passage of an additional 4½ years makes proof of petitioner's fraud in 1933 more difficult. One of the reasons underlying all time limitations, including the doctrine of laches, is the difficulty of proving the case after witnesses are scattered and human memories fade. *Brown* v. *County of Buena Vista*, 95 U. S. 157, 161.

Petitioner has referred (Br. 28) to the need for "inequity founded upon some change in the condition or relations of the property or the party," as essential to proof of laches, citing *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, and *Galliher* v. *Cadwell*, 145 U. S. 368. The *Galliher* case, however, from which the quoted excerpt is taken,

affords an interesting parallel to the present situation. The Court there treated it as significant that the complaining party, who was held to be barred by laches, had shown no interest in the land in question until its value greatly increased. Similarly, the value of American citizenship to persons such as petitioner, who are subject to deportation, was greatly enhanced by Germany's defeat and the resulting impoverishment in that country. Petitioner's recently acquired interest in his citizenship is not a persuasive reason for compelling a court of equity to vacate a judgment entered 4½ years ago.

III.

THE FAILURE TO INTRODUCE EVIDENCE IN SUPPORT OF THE DEFAULT JUDGMENT IS NOT A GROUND FOR SETTING THE JUDGMENT ASIDE

Petitioner argues that the default judgment was unlawful because not supported by clear and convincing evidence. The court below treated this charge as an assertion of error of law apparent on the face of the record, inasmuch as the record shows that no evidence was taken. It is our position that the law does not require the introduction of evidence when a defendant in a denaturalization case defaults, and that in any event petitioner is barred from raising the point 4½ years after entry of the decree.

A. *The district court was empowered to enter judgment by default without a hearing.*—Peti-

tioner contends (Br. pp. 9-19) that the district court was without power to enter a judgment of default without hearing evidence. It was on this basis that Judge Stephens dissented in the court below. Neither petitioner nor the dissenting judge have, however, pointed to anything in the statutes, rules, or decisions of this Court which support their position.

Section 338 of the Nationality Act, providing for denaturalization, contains no direction for a hearing before cancellation of a certificate. It merely directs district attorneys "upon affidavit showing good cause therefor" to institute proceedings for denaturalization. The action which it authorizes is manifestly a civil action (see, *infra*, pp. 41-42).

Rule 55(a) of the Federal Rules of Civil Procedure provides for a default judgment against a party who fails to plead or defend. Rule 55(b) provides for entry of default judgment by the clerk if for a sum certain, and by the court otherwise. Rule 55(b) refers to circumstances in which a default judgment may not be entered, such as infancy, and incompetency, and further provides:

> * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such ref-

erences as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 55(e), on the other hand, provides:

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

These provisions demonstrate that when the rule makers wished to make a hearing on the evidence an absolute requirement to entry of judgment despite a default, they knew how to use apt terminology to accomplish that result.[11] They did not do so for denaturalization proceedings, but left them to be governed by the rule applicable to civil actions generally.

The practice prescribed by Rule 55(b) is essentially the same as the old equity practice described by this Court in *Thomson v. Wooster*, 114 U. S. 104. This Court there said, at pp. 110-111:

* * * A confession of facts properly pleaded dispenses with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved; and a de-

[11] Petitioner refers to the requirement of evidence in uncontested divorce cases. But this requirement is statutory. For Judge Goodrich's comments on this argument see R. 28.

cree *pro confesso* regards the statements of the bill as confessed.

* * *

A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams* v. *Corwin*, Hopkins Ch. 471, by Hoffman, master, in a report made to Chancellor Sanford, of New York, in which the conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso*, was that "when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant."

We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true, 1 Smith's Ch. Pract. 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. * * *

In the *Thomson* case, this Court pointed out, at p. 110, that for at least two centuries an *ex parte* examination on the evidence had not been required in English Chancery practice.

Thus, since long before the adoption of the Constitution, a hearing on the allegations of the complaint has not been required in law or in equity where the allegations of the complaint are clear and the relief sought is definite.

In this case, no hearing was necessary to determine the extent of judgment. The complaint sought limited and specific relief, cancellation of the certificate of denaturalization. The judgment granted the exact relief sought by the complaint. Furthermore, the complaint alleged clearly and definitely that petitioner obtained his certificate of naturalization by fraud in that at the time he took his oath of allegiance to the United States and renounced allegiance to the German Reich, petitioner "did not in fact intend to renounce and abjure absolutely and entirely his allegiance and fidelity to the state or sovereignty of the German Reich of which he was theretofore a subject or a citizen," and that "he did not take the obligations of the oath freely and without any mental reservation or purpose of evasion." (R. 3). Had petitioner, in open court, admitted only that specific fact, a decree of naturalization would have been bound to follow as a matter of course. See *Knauer* v. *United States*, 328 U. S. 654; *United*

States v. *Siegel*, 152 F. 2d 614 (C. C. A. 2), certiorari denied, 328 U. S. 868. Had petitioner written a letter stating that he consented to the decree of naturalization and admitting the facts therein alleged, a court would unquestionably have been justified in dispensing with proof. See *United States* v. *Borchers*, 163 F. 2d 347, 349-350 (C. C. A. 2), certiorari denied, 332 U. S. 811. Petitioner's default was in the eyes of the law the equivalent of a confession in open court. *Thomson* v. *Wooster*, *supra*. Hence, there was no necessity for a hearing "in order to enable the court to enter judgment or to carry it into effect" under Rule 55(b) (2). As the Circuit Court of Appeals for the Second Circuit said in the *Borchers* case, *supra*,

> * * * As to such judgments the default of defendants who have been personally served may well take the place of the "clear and unequivocal" evidence required had the case gone to trial. * * *

On this issue, it is important to bear in mind that we are dealing with a question of power and not of policy. The question here is not whether it might be desirable to hold a hearing before entering a judgment of denaturalization despite a deliberate default. The question is whether a hearing is such an absolute requirement that failure to hold one is an error of law on the face of the record which justifies the setting aside of a judgment. We

submit that a procedure conforming to the established practice of English and American courts for two centuries, a practice which has been changed neither by statute nor by rule, cannot now be deemed invalid.

If denaturalization cases are to be put in a separate category governed by different procedural rules, the statutes or rules should so provide. The trial court cannot be said to have committed an error of law in following the rules as they now stand.

Petitioner argues that the controlling statute, 8 U. S. C. § 738, does not specifically authorize a default judgment of denaturalization. But the section does provide for the commencement of a civil action, akin to a suit in equity, and unquestionably Congress assumed that the rules of court applicable to civil actions would control without any necessity for an explicit reference to them.

Petitioner's argument rests ultimately on the decisions of this Court holding that the evidence in denaturalization cases must be clear, unequivocal and convincing. *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665. These were contested cases, however. It does not follow from the fact that the Government's burden is heavy when a defendant denies the charges and a case goes to trial that the Government must introduce evidence in order to obtain a judgment when the defendant defaults. Peti-

tioner suggests that the *Schneiderman* and *Baumgartner* cases require that in denaturalization cases the defendant must be accorded the same protection as in criminal cases (see Pet. Brief, p. 14). But as Judge Goodrich pointed out in his opinion below (R. 29):

> In other situations in the law courts have laid down requirements of a higher degree of proof than the mere preponderance of the evidence presented but no one thinks the proceedings become criminal trials on that account. Thus there is authority that when one attacks a release he has the burden of sustaining his allegations by clear, precise and indubitable proof.[5] The same is true in certain types of claims based on fraud.[6] The Congress, in regulating the acquisition and loss of citizenship rights has made such proceedings civil[7] and we think the action is not changed into a criminal prosecution by the fact that the Supreme Court has pointed out the necessity of clear evidence in a contested case to take away citizenship rights.
>
> [The footnote references are to citations.]

In addition to the cases cited by Judge Goodrich, there are other classes of civil actions in which an equally high standard of proof has been required without transforming a civil action into a criminal one. See *Maxwell Land-Grant Case*, 121 U. S. 325, 380-382, and cases cited.

Denaturalization proceedings are civil actions, treated as such both by Congress and this Court.

Provision for substituted service in Section 338(b) of the Nationality Act makes it clear that Congress deemed the action civil in character, and establishes also that Congress did not deem the presence of the defendant an absolute requirement for the entry of a judgment of denaturalization. Before the Rules of Civil Procedure abolished the distinction between law and equity, this Court frequently referred to denaturalization actions as equitable actions. *Johannessen* v. *United States*, 225 U. S. 227, 237; *Luria* v. *United States*, 231 U. S. 9; 27; *United States* v. *Ness*, 245 U. S. 319. And in *Knauer* v. *United States*, 328 U. S. 654, this Court upheld the decree of denaturalization based upon a trial without a jury. In so far, therefore, as petitioner claims as a matter of right the constitutional provisions relating to criminal trials, his contentions are manifestly without merit.

Petitioner's argument that he was entitled to have counsel appointed for him despite his default is also predicated on the erroneous assumption that denaturalization proceedings are to be treated as criminal cases. But, as we have shown, denaturalization cases are governed by the Civil Rules, and are not to be treated as criminal merely because of the heavy burden of proof which the Government bears. Petitioner's principal contention is that he was entitled to appointed counsel because he was in custody at the time of the default. If he had been held in such seclusion as to prevent his

taking any effective steps to defend himself, he might have ground for complaint. See p. 18, *supra*. But, his custody did not deprive him of any opportunity to obtain counsel. See pp. 21-31, *supra*. He does not allege that he made or attempted to make any effort on his own behalf, or that the prison authorities prevented him from doing so. On the contrary, his detention gave him his first contact with an attorney, and his failure to appear was a result of the attorney's neglect rather than his inability to obtain counsel as a result of his imprisonment. If petitioner had communicated with the court in New Jersey, asking for the assistance of counsel, undoubtedly counsel would have been appointed for him before the entry of default. But since, even in a criminal prosecution, a defendant may waive his right to counsel, the court was not required to appoint an attorney for a defendant who, by failing to indicate in any way that he wished to appear or answer, showed that he had decided not to contest the allegations of the complaint.

B. *Petitioner's application is untimely.* In any event, on the assumption that petitioner has alleged and shown an error of law on the face of the record, he would not be entitled to relief on this ground since his motion was not timely. Many cases in this Court and elsewhere establish that a bill of review for error of law apparent on the face of the record "must ordinarily be brought

within the time limited by statute for taking an appeal from the decree sought to be reviewed." *Central Trust Company* v. *Grant Locomotive Works*, 135 U. S. 207, 227; *Ensminger* v. *Powers*, 108 U. S. 292, 302; *Thomas* v. *Brockenbrough*, 10 Wheat. 146, 150-151; *Kennedy* v. *Georgia State Bank*, 8 How. 586, 609; *Fraenkl* v. *Cercedo*, 216 U. S. 295, 301; *Hagerott* v. *Adams*, 61 F. 2d 35, 36 (C.C.A. 8), certiorari denied, 288 U. S. 599, quoted *supra* p. 15, and cases cited therein; *Copeland* v. *Bruning*, 104 Fed. 169, 171 (C. C. D. Ind.); *McGinn* v. *United States*, 2 F. R. D. 562, 564 (D. Mass); 8 *Cyc. Fed. Proc.* 371-372;[11a] 3 Moore *Federal Practice* 3261-3262; Simkins, *Federal Practice* (3rd ed. 1938), section 720. Such bills of review were regarded as in the nature of writs of error, and for that reason were required to be filed within

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[11a] "But except as the basis of such a bill is newly discovered evidence, and to the extent that it is grounded upon alleged errors of law apparent upon the face of the record, it has always been held that the time limit for appealing is applicable by analogy and that a bill of review must be filed within the time to appeal. [citing 27 federal cases.] The time within which an appeal could be taken, up to comparatively recent years, was so long that there was little occasion in the early cases to distinguish between bills of review based upon newly discovered evidence and those based upon errors of law, or to apply a time limitation; but time to appeal has gradually been shortened to such an extent that now, being ordinarily less than the six months' limitation on motions to vacate or change judgments under Rule 60(b) of the Rules of Civil Procedure, the remedy by bill of review for errors apparent upon the face of the record is practically obsolete." 8 *Cyc. Fed. Proc.* 371-372.

the time for appeal. Bills of review based upon newly discovered evidence or other matter discovered after the entry of judgment were governed by the requirement of due diligence. See pp. 15-16, *supra*.

Petitioner's contention that the default judgment should not have been entered without the introduction of evidence supporting the complaint is in effect an application for a bill of review for error of law apparent on the face of the record. His application on this ground is clearly too late under the authorities requiring such a bill to be filed within appeal time. And the result would be the same if the general doctrine of laches were applicable. The facts discussed in Point II of this brief (pp. 20-31), showing that petitioner was not deprived of an opportunity to defend, establish that he was guilty of laches in failing sooner to seek equitable relief. The district court and both opinions of the majority in the circuit court of appeals stress the factor of laches as in itself warranting denial of petitioner's application.

IV.

PETITIONER IS NOT ENTITLED TO HAVE THE JUDGMENT VACATED ON THE GROUND THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION.

Petitioner also contends that it appears from the face of the complaint that the Government would not have been able to prove its case by clear, unequivocal and convincing evidence had a hearing

been conducted. Obviously, in the face of the specific allegation of fraud at the time of the oath of allegiance, that is not an error of law apparent on the face of the record. As stated above, an action to set aside a certificate of denaturalization for fraud in the oath of allegiance is a proper action under Section 338 of the Nationality Act. *Knauer* v. *United States*, 328 U. S. 654. Furthermore, on the face of the complaint itself it appears that petitioner's case is much closer to *Knauer* v. *United States*, *supra*, than to *Baumgartner* v. *United States*, 322 U. S. 665, since from the allegations of paragraph 6 of the complaint (R. 3-4), it appears that, very shortly after his naturalization, petitioner was not only an active and effective member of organizations whose principles were incompatible with allegiance to the United States or attachment to the principles of the Constitution, but was a leader of such organizations. Hence petitioner's contention that his was not a proper case for denaturalization does not find support in the record.

Even assuming that the evidence as spelled out in paragraph 6 of the complaint would not have met the test of the *Baumgartner* decision, a bill of review would not lie on such ground. Since the Government was not required to plead its evidence and since the general allegation of fraudulent intent is clearly sufficient to state a cause of action (see complaint in *Knauer* v. *United States*, 328

U. S. 654, October Term, 1945, No. 510, Transcript of Record, p. 1), petitioner's argument seems to be based on the assumption, wholly speculative inasmuch as no evidence at all has been introduced, that the proof under this general allegation would have been inadequate. But a bill of review was never available to reach the sufficiency of the evidence. *Putnam* v. *Day*, 22 Wall. 60, 65; *Beard* v. *Burts*, 95 U. S. 434, 436; *Buffington* v. *Harvey*, 95 U. S. 99. And in *Scotten* v. *Littlefield*, 235 U. S. 407, 411, this Court held that a subsequent decision in another case based on principles which would have required a different result as to the decree under attack, "will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result." See also *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82, 88.

Where defendants have contested denaturalization proceedings but failed to appeal from an adverse decree, the courts having denied bills of review attacking the decree on the basis of the later *Baumgartner* decision. *United States* v. *Kunz*, 163 F. 2d 344 (C. C. A. 2); *Krause* v. *United States*, certiorari denied, 327 U. S. 784.[12] Certainly petitioner, who by his default, admitted the allega-

[12] In the *Krause* case no opinion on the motion to vacate was rendered by the court of appeals. The issue is disclosed by and discussed in the petition for certiorari and the brief in opposition. October Term, 1945, No. 702, 327 U. S. 781. For the earlier opinion of the Seventh Circuit affirming Krause's denaturalization, see 136 F. 2d 935.

tion of fraud in the complaint, is not entitled to greater relief.

Petitioner is also barred from seeking relief on this ground because of his unreasonable delay in bringing this action. See pp. 15-16, 43-45, 23-34, *supra*.

V.

THE RECENT AMENDMENT TO RULE 60(b) REQUIRES NO DIFFERENT RESULT.

A. *The amendment does not govern this case.* —As has been noted, the amendments to the Federal Rules of Civil Procedure became effective on March 19, 1948, after the court below had rendered its decision affirming the refusal of the district court to vacate the default judgment of denaturalization. Rule 86(b), dealing with the effective date of these amendments, provides that "They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

Applying only to "further proceedings in actions then pending", the amendments to the Rules have no retroactive effect. They cannot render unlawful what the district and circuit courts of appeals did before the amendments came into effect. They apparently do not contemplate re-

versal by an appellate court of a trial court decision which was correct when entered. If there are to be "further proceedings" in the district court, the amendments will normally apply; but they were not intended to afford a means of reopening proceedings that had been completed in the district court before their effective date.

B. *Petitioner is not entitled to relief under the amendment.*—But even assuming that amended Rule 60 (b) could be regarded as applicable to this case, we believe that an affirmance of the decision below is required. The amended rule abolishes the old writs and bill of review. It provides for relief from judgments for six reasons. Motions based upon (1) mistake, inadvertence, surprise or excusable neglect, (2) newly discovered evidence, and (3) fraud, misrepresentation, or "other misconduct of an adverse party", must be made within one year. Motions made for the other reasons specified, which include (4) judgments shown to be void and (6) "any other reason justifying relief from the operation of the judgment" are expressly required to be made "within a reasonable time." The rule does not limit the power of courts to entertain an independent action, to grant relief to a defendant not actually notified, or to set aside a judgment for a fraud on the court.

In so far as the amended rule provides for relief by motion, petitioner's allegations with respect to his arrest and subsequent custody attempt to establish either excusable neglect under

subdivision (1), or "misconduct of an adverse party" under subdivision (3). Under the amended rule, however, the time to bring a motion on either of such grounds is limited to one year after judgment—a period which has long since expired.

Hence, except for subdivision (6) of the amended Rule, a point we discuss *infra*, pp. 51-52, it appears that under amended Rule 60(b), petitioner could attempt to impeach the judgment for errors of fact only by an independent action, a form of relief preserved by the amended Rule. See Notes of Advisory Comm. on amendment to Rule 60(b), 28 U. S. C. p. 3320. A showing that a defendant, without fault on his part, has been deprived by the adverse party of an opportunity to present a defense would be grounds for an independent action in equity (*United States* v. *Throckmorton*, 98 U. S. 61, 65-67), and petitioner's allegations that his custody prevented him from making a defense might be deemed to present such a cause of action. This Court has held, however, that an independent action does not lie against the United States without its consent. *Hill* v. *United States*, 9 How. 386, 389; *Avery* v. *United States*, 12 Wall. 304. See also *Zegura* v. *United States*, 104 F. 2d 34, 35-36 (C. C. A. 5), certiorari denied, 308 U. S. 586; *Gherwal* v. *United States*, 46 F. 2d 998 (C. C. A. 9).

As to petitioner's allegations of errors of law, he could, under the amended Rule, attack the judgment by motion only under subdivision (4)

on the ground that the judgment was void. However, the judgment of denaturalization clearly is not void, inasmuch as the petitioner was personally served, the complaint states a cause of action within the jurisdiction of the court, and the relief granted was also within the district court's authority. See *Knauer* v. *United States*, 328 U. S. 654. As to the alleged errors of law which do not affect basic jurisdiction, we entertain serious doubts as to whether the old bill of review for non-jurisdictional errors apparent on the face of the record has any vitality under amended Rule 60(b). The new rule abolishes bills of review. While it specifies the other errors reached by that type of proceeding—newly discovered evidence and fraud—it makes no mention of the type of error reached by a bill of review for error apparent. As noted above, pp. 43-45, the bill of review for error apparent served the purpose of a writ of error and was limited by the time for appeal. Appeal is a completely adequate remedy for the kind of defect reached by that proceeding. While the notes to the amended Rule are silent on the point, the language of the amended Rule seems to point toward the conclusion that the type of error which could be attacked either by a bill of review for error apparent or by appeal will no longer form the basis of a motion to vacate in the district court. Such error apparently did not form the basis of an independent action, certainly not after the time to appeal had expired. Furthermore, as we have

shown in Point III, there are no errors of law apparent on the face of the record.

There remains for consideration petitioner's rights under subdivision (6) of the amended Rule providing for the vacating of a judgment by motion for "any other reason justifying relief from the operation of the judgment." This amendment (together with other changes made in the draft Rule as proposed) was adopted in the precise form suggested in Moore and Rogers' article. 55 Yale L. J. at pages 692-693. The authors recommended that if an inclusive rule stating specific grounds was to be adopted "some general residual clause would probably be necessary to cover unforeseen contingencies even at the risk of undercutting the principle of inclusiveness."

We think it is clear that Subdivision (6) was not meant to bring about a fundamental change in the principle that final judgments are not lightly to be set aside for insubstantial reasons; the subdivision was included in the rules to permit some flexibility in the application to particular facts of the principles developed under the old remedies without being completely bound by the narrow circumstances in which the older remedies applied.

We do not believe that petitioner would be entitled to relief under this subdivision. As we have said, it is not our position that petitioner cannot obtain relief on a showing of basic injustice; it is our position that, for reasons set forth in Points II and III, *supra*, he has made no such showing.

Furthermore the amended Rule makes explicit what was implied in the original Rule—that all motions not required to be made within a specified period must be made "within a reasonable time." This limitation applies to subdivisions (4) and (6). For reasons already stated (pp. 21-34, *supra*), we think it clear that four and one-half years was an unreasonable time for petitioner to wait before moving to vacate the judgment in this case.

CONCLUSION

Petitioner has shown no fundamental error of fact or of law invalidating the judgment of denaturalization. He has shown merely a newly awakened interest in American citizenship four and one-half years after he permitted the denaturalization judgment to be entered against him. We therefore respectfully submit that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

October 1948.

APPENDIX.

Section 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.
>
> (b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

Rule 6(b), Federal Rules of Civil Procedure,[5]

[5] As amended, these rules and the notes of the Advisory Committee with respect thereto appear in 28 U. S. C. fol. sec. 723(c).

prior to its recent amendment, provided:

> (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

As amended, the Rule changes the last clause to read as follows:

> * * * but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

Rule 55(b) (2) of the Federal Rules of Civil Procedure provides in part:

> * * * If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to

make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

Rule 60(b) of the Federal Rules of Civil Procedure, prior to its recent amendment, provided:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.

Rule 60(b) as amended, provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable

neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 86(b) provides:

EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1948

AUGUST KLAPPROTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO MODIFY JUDGMENT

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO MODIFY JUDGMENT

Respondent respectfully moves this Court to modify its judgment in this cause so as to permit respondent to contest the facts alleged in the petition to vacate the default judgment, for the following reasons:

In this case the District Court sustained the Government's challenge to its authority to grant the relief requested in Klapprott's petition to vacate the default judgment (R. 17). The Government's position was that the allegations of the petition were insufficient on their face to show that he was entitled to the relief sought. On appeal, the Court of Appeals and this Court prop-

erly considered the case on the hypothesis that the allegations of Klapprott's petition were true. This Court has now held that the petition does adequately state a cause of action, and we are not asking reconsideration of that decision.

But we have always assumed that the overruling of a motion to dismiss or demurrer, whether by the trial or appellate court, does not warrant the entry of a judgment for the party plaintiff upon the basis merely of the allegations of his pleading. The status of the case then is that the defending party (the Government, on this petition to vacate) has an opportunity to contest the factual allegations of the plaintiff in the trial court. We know of no procedure by which a judgment for the plaintiff can be entered merely upon the denial of his adversary's motion to dismiss.

The record before this Court contains only a brief reference in the District Court's opinion to the Government's position as a challenge to "the authority of the Court to grant relief at this time" (R. 17). But the typewritten transcript of the argument before the District Court shows definitely that counsel for petitioner, Assistant United States Attorney Ryan, and the court all assumed—and indeed stated—that they were dealing preliminarily with the question of the court's jurisdiction, and that if the Court did not dismiss the petition for lack of jurisdiction,

the parties would have a chance to submit evidence by way of affidavit, deposition, or otherwise.

Counsel for petitioner, in his opening, stated (Tr. 2):

> Mr. Ryan indicated to me the other day that he had intended to apply or make an application to have the petition and order to show cause dismissed for lack of jurisdiction, and that is why we suggested that Mr. Ryan proceed with his application.

Tr. 7:

> Now, if the Court please, as I started to say before, prior to the return day of the order to show cause I communicated with Mr. Ryan for the purpose of obtaining a stipulation under Rule 29 for the taking of depositions. When I spoke with Mr. Ryan about questions of fact I asked him whether he intended to file affidavits and rely upon them because I said if he hadn't or didn't I would want to take depositions under the rule. Mr. Ryan then told me that he had no affidavits prepared and that he didn't propose to bring any with him this morning but that he intended to make an application on the merits, on the question of law, rather, as to jurisdiction. For that reason Mr. Ryan, according to our understanding, was to proceed with his motion.

He indicated to me, or said to me that if the matter was not decided on the jurisdic-

tional question he would make application for further time in which to file affidavits.[1]

Tr. 8:

. . . in view of our understanding of the other day I don't care to proceed this morning on these affidavits, it is my intention, and was, to have depositions taken under the rule so that witnesses could be sworn and examined, so that the Court would have the full story before it, all of the facts upon which to determine, particularly when matters of judicial discretion arise.

Now, *I therefore say that if Mr. Ryan wishes to proceed with his application under the law, and then if it is not granted to ask for time on the question of facts, I will be very happy to go along with it because that was our agreement.*

Tr. 11-12:

. . . we are not ready this morning to argue that point in view of the understanding I have had with Mr. Ryan, because that is a matter which would be addressed to the Court's discretion, I'd say. And in that case your Honor must have all of the facts before you. This petition and affidavit was merely for the purpose of obtaining the order to show cause and it loses its efficacy on the return day. We must proceed under Rule 29 or 30 to take depositions so that the entire facts are before the Court, the witness' own statements, with a right to cross-examine.

[1] All italics supplied.

The District Court subsequently stated (Tr. 13–14):

> Now, regardless of depositions, affidavits or otherwise, the initial question which the Court must answer is whether or not under any circumstances, and regarding the facts most favorably to the petitioner, the Court has any jurisdiction at all to vacate the original judgment.
>
> *Now, depositions aren't needed if the Court decides that as a matter of law,* and regardless of what prompted the neglect, excusable or inexcusable, and regardless of what it was, *the Court has no jurisdiction* to open and vacate a judgment entered four and a half years ago. That is a question of law.
>
> Now, I don't know why we have to go through the cumbersome procedure of taking depositions and why Mr. Ryan should be required to furnish affidavits.
>
> Mr. SEMEL. May I answer that?
>
> The COURT. Yes.
>
> Mr. SEMEL. Well, that is exactly what I assumed we were ready to argue.

Tr. 19:

> The COURT. But he can have his day in my court only upon proof that the Court has jurisdiction, which is the first hurdle that this petitioner must meet at this stage of the proceeding. And I say the six months period having elapsed it doesn't resolve itself into a question of fact, in my judgment, which may be wrong,

I have been wrong many times, it is purely a question of law.

Tr. 22:

Now, I think we have got to meet the question of law first and regardless of any depositions or affidavits or anything else, the question of law is a simple one, at least it is a narrow one, it may not be simple but at least it is narrow: Does this Court have jurisdiction after the lapse of four and a half years, no action having been taken by the petitioner in the meantime, or the defendant in the original suit, to open and vacate that judgment?

The Assistant United States Attorney then stated (Tr. 22):

In the first place, I would like to state that I made no arrangement with Mr. Semel. Mr. Semel called me and told me that he thought he might like to have a postponement, to which I did not consent and for which I had no authority.

At that point he asked me about the opposition which would be made and I frankly told him that I conceded primarily *the first question* was a jurisdictional one, and I, I, thought good enough to tell him what our position would be so he might prepare himself somewhat.

Tr. 23:

* * * the question is, as your Honor has so well stated, does this Court have jurisdiction?

The Assistant United States Attorney then proceeded to give an example of a factual allegation which he believed to be false and would contest on the merits if necessary, but he was not permitted to elaborate because, in the words of petitioner's counsel, "this argument was confined to the jurisdictional question" (Tr. 25).

Tr. 24–25:

> Now, reviewing a petition which has been filed here by the defendant, he charges primarily that, first, when he was served he was too ill to answer. Well, shortly after the defendant was served, which was on May 15; there was a Grand Jury proceeding in Hartford, Connecticut, I believe it was, at which his presence was required and he was served by subpoena and he demurred and said he was too ill to attend, that he previously had had a case of ulcers. At that time there was an examination by his own physician of the defendant and he was pronounced well enough to attend; and he did attend in Connecticut.
>
> Mr. SEMEL. May I interpose an objection here? Mr. Ryan is arguing a question of fact, he has nothing upon which to base his argument. I thought this argument was confined to the jurisdictional question.
>
> The COURT. I think primarily it is one of jurisdiction in the first place. I don't think we have to go into the merits of his affidavit.

Tr. 28:

> Mr. RYAN. I just wish to say to the Court and counsel my reference to the application was not for the purpose here of saying something which I have no proof of, either by way of affidavit or deposition, but to assure both the Court and counsel that if the petitioner should get over the jurisdictional hurdle and get into the merits of his application, as your Honor said he would have to show, that there is reasonable cause to conclude that if he had then presented the facts to the Court there would have been a different result. *My purpose was merely to assure the Court and counsel that on the merits we are prepared to meet the allegations of the defendant.*

The Court indicated plainly that if the petitioner satisfied the Court on the matter of jurisdiction, it would proceed to the merits of the application and take evidence.

Tr. 27–28:

> The COURT. But we don't have to meet that, we don't have to meet that but we must meet before we can proceed further the question of jurisdiction because regardless of any other question the Court cannot act, even if this were fraudulently procured, the Court cannot act unless it meets the jurisdictional requirements. This is a court of limited jurisdiction. Of course not limited authority in that re-

spect, broad authority but limited jurisdiction and we can proceed only when the law permits us and in a manner in which the law permits us. And this petitioner in my judgment to succeed in this application has got to bring himself within the rule that I have read to satisfy this Court that as a matter of law the rule has no application. *If you succeed in that we can then proceed to the merits.*

Mr. SEMEL: *That is true.*

The COURT. *But until you succeed in proving to the Court how the rule does not apply we cannot proceed to the merits, and I am not interested in any affidavits except that of the plaintiff.*

In the Court of Appeals the Government stated in its brief that since "the sole issue upon which appellant's petition was dismissed in the District Court was the jurisdictional question raised by the Government * * * if the dismissal should be reversed on appeal, it would require an order remanding the matter to the District Court for consideration of the merits of appellant's petition, rather than a vacation of the judgment of July 21, 1942, by which appellant's citizenship was revoked." And in this Court the Government reiterated that except for purposes of testing the sufficiency of petitioner's allegations, "the Government does not admit the truth of the facts averred by petitioner (except those of record) and assumes that the proceeding would

be remanded for trial if this Court were of the view that the petition set forth a cause of action" (Br. p. 6).

If the customary practice is followed—as both parties assumed it would be—whereby a contest of factual allegations is permitted after jurisdictional objections have been overruled, this proceeding would be remanded to the district court with opportunity to the Government to meet Klapprott's allegations. But this Court's judgment orders the case remanded to the district court "with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint." This deprives the Government of the opportunity to which it is entitled under accepted principles of procedure to challenge the allegations of the petition.

If this Court had held as a matter of law, apart from the particular facts alleged, that the default judgment was void for failure to hold a hearing, there would be no purpose in a remand for proof of petitioner's allegations. But Mr. Justice Burton's concurrence rests "on the special circumstances here shown on behalf of this petitioner", and this would seem to refer to the whole body of facts set forth in the petition, and not merely to the formal facts of record and to the undeniable fact of imprisonment. But the facts set forth in the petition have not been shown

to be true; they have merely been alleged.[2] Except for purposes of testing the sufficiency of the petition, they have not been admitted by the Government's challenge to the authority of the district court to grant the relief sought, which was in the nature of a demurrer. The Government should not be held to have forfeited its chance to defend against the petition to vacate because the United States Attorney—not unreasonably, since six out of thirteen judges have agreed with him—thought the petition insufficient on its face and challenged it only on that ground in the first instance.

We have reason to believe that there may be additional facts, which were not in the record and hence could not be mentioned in this Court, which might have a substantial bearing on the verity of petitioner's allegations purporting to show that he was prevented from contesting the denaturalization complaint. This Court should not assume petitioner's veracity as a matter of law. Only if this Court's judgment permits a trial of the allegations of the petition to vacate can these matters be explored. We are, of course, not suggesting this modification of the judgment for dilatory reasons or merely to harass petitioner, although we believe that the Government

[2] Petitioner's counsel conceded that the affidavit attached to the petition "was merely for the purpose of obtaining the order to show cause and it loses its efficacy on the return day." (Tr. 12).

is entitled as a matter of law to a chance to contest the allegations of the petition.

In the absence of a holding that the default judgment must be vacated irrespective of the circumstances alleged in the petition to vacate that judgment, we submit that trial of the denaturalization complaint, as presently ordered, is premature, until petitioner establishes (either by the Government's failure to deny his allegations or by proof of them) the "special circumstances" referred to by Mr. Justice Burton. If these circumstances are not established as facts, petitioner is not entitled to have the default judgment vacated. And not until the "special circumstances" which would warrant the vacating of the default are established by some orderly legal process is petitioner entitled to trial of the original denaturalization suit. See the dissenting opinion of Mr. Justice Frankfurter.

We therefore respectfully pray that the judgment of this Court be modified so as to remand the case to the District Court for further proceedings consistent with the view that the petition to vacate the default on its face states a basis for relief, and that there be deleted from the judgment the present instruction to set aside the default judgment and hold a hearing on the merits raised by the denaturalization complaint.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE: 1949

IN THE

Supreme Court of the United States

October Term 1948

No. 42

AUGUST KLAPPROTT, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION TO STAY MANDATE AND FOR CLARIFICATION OF MODIFIED JUDGMENT ENTERED APRIL 4, 1949

On April 4, 1949 this Honorable Court modified the judgment heretofore entered on January 17, 1949, and which modification reads as follows: "The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings."

Petitioner respectfully requests that the Court clarify the language of the modified judgment.

Petitioner believes the purpose of the modified judgment is to make proof of the allegations contained in the petition and affidavit filed in the District Court (App. 7-15) as to the reasons why he failed to appear and defend himself in the denaturalization proceedings, as a condition precedent to a trial on the merits. However, petitioner respectfully submits that the language of the Court's modified judgment goes far beyond that. In petitioner's petition which was filed to vacate the default judgment there is contained therein numerous allegations answering the charges in the complaint and other statements which have no bearing on petitioner's inability to have appeared and defended himself in the denaturalization proceedings and the burden of proof of the truth or falsity of such allegations should be upon the Government at the time of trial of the case on the merits.

Therefore, petitioner respectfully requests that the Court stay the mandate and clarify its modified judgment by limiting the evidence to be received by the District Court as to the truth or the falsity of petitioner's allegations only as to the reasons why he was unable to appear and defend himself in the denaturalization proceedings, and as to matters that transpired during his period of confinement.

Respectfully submitted,

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